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NO. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

THE DOW CHEMICAL COMPANY,
a Delaware corporation,
Petitioner,
vs.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
and DOUGLAS M. COSTLE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

DID CONGRESS, WHEN IT ENACTED THE 1977 CLEAN AIR ACT AMENDMENTS, INTEND TO PRECLUDE A STATE FROM PERMITTING A SOURCE TO OPERATE A SUPPLEMENTARY CONTROL SYSTEM (SCS) *ON AN INTERIM BASIS* TO MEET AMBIENT AIR QUALITY STANDARDS (AAQS) UNTIL IT FINAL MEANS OF CONTINUOUS CONTROL (WHICH HAD BEEN CONTRACTED FOR BEFORE ADOPTION OF THE CLEAN AIR ACT OF 1970) COULD BE PLACED IN OPERATION?

The Court of Appeals answered this question "yes."

Petitioner contends the answer is "no."

II.

DID THE COURT OF APPEALS ERR IN REFUSING TO REVIEW THE LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977 ON THE GROUND THAT THE RELEVANT STATUTORY PROVISIONS WERE "OBVIOUS AND UNAMBIGUOUS?"

Petitioner contends the answer is "Yes."

III.

DID THE COURT OF APPEALS ERR IN CONCLUDING THAT, EVEN THOUGH THE AMBIENT AIR QUALITY STANDARDS (AAQS) FOR SULFUR DIOXIDE WERE BEING MET, THE STATE OF MICHIGAN COULD NOT REVISE ITS STATE IMPLEMENTATION PLAN (SIP) TO ACCOMMODATE PETITIONER'S UNIQUE COMPLIANCE PROBLEMS BECAUSE OF THE PARTICULAR VOLUME OF SULFUR DIOXIDE BEING EMITTED BY PETITIONER?

Petitioner contends the Answer is "Yes."

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Petitioner THE DOW CHEMICAL COMPANY (Dow) respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in these proceedings on December 9, 1980. Petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc in a timely manner, which Petition was denied by the United States Court of Appeals for the Sixth Circuit on February 9, 1981.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. A copy of the opinion is contained in the Appendix annexed hereto. (App. 1)

JURISDICTION

The Judgment of the Court of Appeals was entered on December 9, 1980. (App. 35) Petitioner thereafter filed a Petition for Rehearing and Suggestion for Rehearing En Banc on December 23, 1980, which Petition was denied by the Court of Appeals on February 9, 1981. (App. 36) This petition for writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are specific provisions of the Clean Air Act of 1970 as amended by the Clean Air Act Amendments of 1977. The provisions involved are:

42 U.S.C. § 7407(d)(1)-(2)
42 U.S.C. § 7410(a) (1)-(3)
42 U.S.C. § 7423(a)-(b)
42 U.S.C. § 7501(2)
42 U.S.C. § 7602(k)
42 U.S.C. § 7602(m)
42 U.S.C. § 7607(b)(1)

Because of their length, these statutory provisions are set forth in the annexed Appendix. (App. 36-45)

STATEMENT OF THE CASE

This case involves the question of whether Congress, in enacting the Clean Air Act Amendments of 1977, intended to prohibit sources from using Supplementary Control Systems (SCS) on an *interim* basis to meet ambient air quality standards until their final means of compliance (statutorily mandated "continuous controls") could be placed in operation. The parties here agree that a source's *final* means of compliance with the provisions of the Clean Air Act must be "continuous controls." The issue which divides the parties is whether the Clean Air Act Amendments of 1977 were intended to bar *interim* use of a SCS by a source to meet ambient air quality standards until its final means of continuous control (delayed for reasons over which it had no control) could be placed in operation.

In 1967, Dow and Consumers Power Company entered into a contract for what was to become Dow's final "continuous" means of compliance with the requirements of the subsequently enacted Clean Air Act of 1970. This contract committed Dow to retire its old fossil fuel fired boilers, purchase steam and electricity from a nuclear plant to be constructed at Midland, Michigan and reimburse Consumers, as a portion of the steam rates ultimately to be charged, for in excess of $700 million in construction costs incurred by Consumers in building the nuclear plant at Midland, Michigan. The nuclear plant was originally scheduled to be completed in 1974 but various delays, completely beyond Dow's control, moved the start-up date to 1980, then 1982 and now 1984.[1]

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[1] Some of the reasons for the delays are set out in *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

In order to provide for an *interim* means of meeting the ambient air quality standards (AAQS) by 1975 (as required by the Clean Air Act of 1970) until the nuclear plant could be completed, Dow was authorized by the Michigan Air Pollution Control Commission (MAPCC), through a series of Consent Orders or variances (App. 46, 53, and 70), to operate a Supplementary Control System (SCS)[2] in lieu of constructing tall stacks or implementing other systems found to be either economically or technologically infeasible.[3] There is no dispute between the parties that, since implementation of Dow's SCS, the system has proven completely successful in attaining and maintaining the relevant AAQS in the Midland County area.

All the Consent Orders or variances [Consent Order 12-73-05 (App. 46), Consent Order No. 10-1977 (App. 53) and Consent Order No. 01-1979 (App. 70)] were submitted by the MAPCC to the U. S. Environmental Protection Agency (EPA) for its review and approval. Moreover, as required by the Clean Air Act

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[2] Dow's SCS is a sophisticated computer-controlled system which uses 8 monitors to sample air quality and a computer model to predict air quality at 83 points in the Midland area. The system limits the rate of pollutant emissions during periods when meteorological conditions are such that violations of the AAQS will occur unless pollutant emissions are reduced. This is accomplished by shifting from the use of coal as a fuel to the use of oil or natural gas.

[3] Dow and the MAPCC agreed that it was economically infeasible, in view of Dow's contractual commitment to Consumers to reimburse it for the cost of building the nuclear power plant in Midland, Michigan, to require the expenditure of tens or hundreds of millions *more* to improve existing coal fired units or to build new coal fired units when these units would have to be abandoned when the nuclear plant became operational.

Amendments of 1977 [42 U.S.C. 7407(d)(1)], the MAPCC designated Midland County an "attainment" area for sulfur dioxide (App. 36-37; 44; 125-127) and submitted this designation to EPA on December 30, 1977. (App. 136-137) EPA thereafter took the position that, in enacting the Clean Air Act Amendments of 1977 [specifically 42 U.S.C. § 7423(a) and (b) and 42 U.S.C. § 7602(k) and (m)], Congress intended to bar *interim* use of a SCS by a source to meet the relevant AAQS until its continuous means of control could be placed in operation. It contended that Congress, in enacting the 1977 Clean Air Act Amendments, had mandated use of *continuous* controls in *all* circumstances. EPA thereafter redesignated Midland County as a "non-attainment" area with respect to sulfur dioxide emissions (See App. B — EPA non-attainment reg.) and formally rejected Dow's most recent Consent Order No. 01-1979 as a revision to the Michigan State Implementation Plan (SIP). (See App. B — EPA reg. rejecting SIP revision)[4] In taking this action, EPA conceded that the AAQS were being met but took the position that they were being met through operation of a system (the SCS) which it viewed as prohibited by the Clean Air Act Amendments of 1977.

Dow timely filed Petitions to Review with the United States Court of Appeals for the Sixth Circuit,[5] seeking

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[4] With respect to Dow's earliest Consent Order 12-73-05, EPA acknowledged receiving it by letter dated July 10, 1974, stated that it was reviewing it, and would contact the MAPCC if further information was needed. (App. 52-53) It never thereafter contacted the MAPCC or Dow to voice any objection to the interim use of Dow's SCS. With respect to Consent Order No. 10-1977, EPA acknowledged its receipt in an exchange of letters with the MAPCC (App. 64, 65 and 67) and thereafter caused the MAPCC to refuse to pursue its efforts to have the Consent Order approved as a SIP revision. (App. 104)

[5] The Court of Appeals had jurisdiction over the Petitions to Review pursuant to 42 U.S.C. § 7607(b)(1). (App. 44-45)

review of EPA's redesignation of Midland County, Michigan as a "non-attainment" area (Docket Nos. 78-3139 and 78-3595) and its rejection of Dow's Consent Order No. 01-1979 as a SIP revision (Docket No. 80-3260). Dow argued that case law decided prior to the Clean Air Act Amendments of 1977 specifically authorized use of a SCS on an *interim* basis where continuous controls were either technologically or economically infeasible. [*Natural Resources Defense Council, Inc. v. U. S. Environmental Protection Agency*, 489 F. 2d 390 (5th Cir. 194), *reversed in part on other grounds, sub. nom. Train v. Natural Resources Defense Council, Inc.*, 421 U. S. 60 (1975); *Big Rivers Electric Corporation, et al v. U. S. Environmental Protection Agency*, 523 F. 2d 16 (6th Cir. 1975), *cert. denied* 425 U. S. 934 (1976); *Kennecott Copper Corporation v. Train*, 526 F. 2d 1149 (9th Cir. 1975), *cert. denied* 425 U. S. 935 (1976); *Kennecott Copper Corporation v. Train*, 424 F. Supp. 1217 (D. Nev. 1976), *reversed on other grounds, sub. nom. Kennecott Copper Corporation v. Costle*, 572 F. 2d 1349 (9th Cir. 1978); *The Bunker Hill Company v. U. S. Environmental Protection Agency*, 572 F. 2d 1286 (9th Cir. 1977)] Dow also argued that the legislative history of the Clean Air Act Amendments of 1977 contained comments indicating that Congress (a) was legislatively affirming the holdings of these cases in enacting the Clean Air Act Amendments of 1977; (b) was mandating use of continuous controls as a source's *final* means of compliance but (c) was continuing to authorize *interim* use of a SCS where a source's final means of continuous control had not yet been placed in operation for reasons over which it had no control.

The Court of Appeals, after hearing argument in the "non-attainment" case on June 16, 1980, consolidated the "non-attainment" case (Nos. 78-3139 and 78-3595) with

the "SIP revision rejection" case (No. 80-3260) since the central issue of the legality of *interim* use of Dow's SCS was common to both cases. The Court thereafter scheduled and heard reargument. (App. 34) On December 9, 1980, the Court of Appeals filed its opinion dismissing Dow's Petitions to Review in which it held that:

(a) even though ". . . some of the language relied upon by Dow does seem to conflict with what we believe to be the obvious and unambiguous language of the 1977 statutory provisions quoted above" (42 U.S.C. § 7602(k); 42 U.S.C. § 7423(a) and (b)), the Court could ignore the legislative history in construing the statutory provisions involved since the statutory provisions were ". . . themselves obvious and unambiguous." (App. 6)

(b) even though the ambient air quality standards for sulfur dioxide were being attained, the State of Michigan could not grant Dow the variance in question (Consent Order No. 01-1979) and revise its SIP because of the particular levels of sulfur dioxide then being emitted from Dow's stacks. (App. 6)

Dow filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, arguing, *inter alia*, that the Court's refusal to review the legislative history in construing the statute contravened this Court's ruling in *Train v. Colorado Public Interest Research Group, Inc.*, 426 U. S. 1 (1976). Dow also argued that the Court's holding that Dow's Consent Order No. 01-1979 (or variance) could not be approved as a SIP revision because of the volume of its sulfur dioxide emissions (at a time when the AAQS for sulfur dioxide were admittedly being attained) was contrary to the decisions

of this Court in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U. S. 60 (1975) and *Union Electric Co. v. U.S. Environmental Protection Agency*, 427 U. S. 246 (1976); *reh. denied* 429 U. S. 873 (1977) which held that, so long as the relevant AAQS are being met, the *state* — not EPA or the courts — alone determines which sources may be granted variances and what volume of pollutants they may emit.

The Petition for Rehearing and Suggestion for Rehearing En Banc was denied on February 9, 1981. (App. 36)

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS IS DIRECTLY IN CONFLICT WITH THIS COURT'S DECISION IN TRAIN V. COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., 426 U.S. 1 (1976)

In the consolidated Petitions to Review before the Court of Appeals, Dow argued that Congress, in enacting the Clean Air Act Amendments of 1977, had not intended to reverse then existing case law which held that Supplementary Control Systems (SCS) could be used on an *interim* basis to meet ambient air quality standards where continuous controls were either technologically or economically infeasible. Dow pointed to the legislative history which contained comments supportive of its position. The Court of Appeals, while noting that ". . . some of the language relied upon by Dow does seem to conflict with what we believe to be the obvious and

unambiguous language of the 1977 statutory provisions quoted above . . . ," (App. 6) concluded that it need not review the legislative history to resolve the apparent conflict since the statutory provisions before it were ". . . easily understandable and unambiguous." (App. 6)[6] In ignoring the legislative history as an aid in interpreting this very complicated statute, the Court erred. In *Train v. Colorado Public Interest Research Group, Inc.*, 426 U. S. 1 (1976), this Court reversed a Court of Appeals decision involving an interpretation of provisions of the Federal Water Pollution Control Act. There, the Court of Appeals ignored the legislative history of the Act because it found that the statute itself was ". . . plain and unambiguous" — although it did note that the legislative history was in conflict. This Court reversed, stating:

> "To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA in discerning its meaning, the court was in error. As we have noted before: 'When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' (citations omitted) In this case, as

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[6] The Court cited *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) and *United States v. Oregon*, 366 U.S. 643 (1961) in support of its conclusion that it need not review the legislative history. However, neither of these cases involved a situation where the legislative history was in fact in conflict with the "easily understandable and unambiguous" statutory language. As noted above, *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976) is directly in point since it does deal with a situation where, as here, the legislative history conflicts with the meaning attributed to the statute by the Court.

we shall see, the legislative history sheds considerable light on the question before the Court." (426 U. S. at 9-10)

If the Court of Appeals here had considered the legislative history of the 1977 amendments as an aid in interpreting the statute itself, it would have noted that:

(i) In enacting 42 U.S.C. § 7602(k), § 7423(a) and § 7423(b), which call for continuous controls to meet ambient air quality standards, Congress was dealing with a source's *final* means of control and was not addressing the question of whether a SCS could be operated on an *interim* basis to meet AAQS until a source's final means of continuous controls could be implemented.

(ii) The House Report, after discussing eight objections to the use of tall stacks and SCS, stated as follows:

"*Testimony*. — For the foregoing reasons, both the Environmental Protection Agency and the Federal Energy Administration testified in 1975 that *the final means of compliance should be continuous emissions reduction and that intermittent controls and tall stacks should only be used as interim measures under limited circumstances.* (H. 156, 1181). The National Academy of Sciences has concurred. Similarly, the representative of the State and Territorial Air Pollution Program Administrators has testified as follows:

" 'Mr. Rogers. *Does STAPPA agree with intermittent controls or continuous controls for stationary sources?*

" 'Mr. Barden. *STAPPA passed a resolution advocating that intermittent controls be used only during the interim, while permanent controls are being installed. Continuous controls should be the method of permanent control.*' " (H. 631-2) (H. Rpt. at p. 91) .

(iii) Three Court of Appeals decisions (one from the Sixth Circuit) decided prior to the 1977 amendments held that a source's final means of compliance with AAQS must be continuous controls but that a state may authorize interim use of a SCS where continuous controls were either economically or technologically infeasible. As to the 1977 amendments' effect on these cases, the House Report said:

"The Committee proposal is intended to ratify the general thrust, if not the specific holdings, of the three U. S. courts of appeals which have considered the issue of the permissibility of intermittent controls, tall stacks, and other dispersion enhancement techniques. *NRDC v. EPA*, 489 F. 2d 390 (5th Cir. 1974); *Big Rivers Electric Corp. v. EPA*, 523 F. 2d 16 (6th Cir. 1975); *Kennecott Copper Corp. v. EPA*, 526 F. 2d 1149 (9th Cir. 1975), *cert. denied* in each case. (emphasis supplied)

* * *

"By defining the terms 'emission limitation,' 'emission standard,' and 'standard of performance,' the committee has made clear that constant or continuous means of reducing emissions must be used to meet these requirements. By the same token, intermittent or supplemental controls or other temporary, periodic, or limited systems of control

would not be permitted as a final means of compliance." (H. Rpt. No. 294 at pp. 91-92) (emphasis supplied)

Thus, when the statutory provisions relied upon by the Court of Appeals are read in light of the legislative history, it is clear that Congress intended to mandate continuous controls as the *final* means of compliance but did not preclude use of a SCS *on an interim basis* to meet AAQS until a source's final means of compliance could be brought on-line.

Thus, the action of the Court of Appeals, in refusing to review the legislative history as an aid to interpreting the statutory provisions before it, is in direct conflict with *Train v. Colorado Public Interest Research Group, Inc., supra*. As this Court noted in *Train, supra*:

> "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' " (426 U. S. at 10)

Yet the Court of Appeals here held that:

> *"It is, however, a cardinal rule of statutory interpretation that the courts do not turn to legislative history to shed light on the meaning of easily understandable and unambiguous statutory enactments.* See *Southeastern Community College v. Davis*, 442 U. S. 397 (1979); *United States v. Oregon*, 366 U. S. 643 (1961)." (emphasis supplied) (App. 6)

As noted *supra* at page 9, Petitioner does not believe that the cases cited by the Court of Appeals support the rule of statutory interpretation it announced and that

Train v. Colorado Public Interest Research Group, Inc., supra, is controlling (and contrary to the Court of Appeals' holding). If Petitioner is in error, then it is apparent that the pronouncements of this Court in *Train v. Colorado Public Interest Research Group, Inc., supra, Southeastern Community College v. Davis, supra,* and *United States v. Oregon, supra,* regarding the function of the federal courts and the sources available to them in construing "clear and unambiguous" federal statutory enactments are in conflict. By granting this Petition for Writ of Certiorari, this Court can finally put to rest the question of whether and when federal courts should resort to the legislative history of federal statutory enactments for guidance in construing legislative enactments found to be "clear and unambiguous." This issue is clearly one of great importance to the federal judicial system and merits this Court's consideration.

II.

THE DECISION OF THE COURT OF APPEALS IS DIRECTLY IN CONFLICT WITH THIS COURT'S DECISIONS IN TRAIN V. NATURAL RESOURCES DEFENSE COUNCIL, INC., 421 U. S. 60 (1975) AND UNION ELECTRIC CO. V. EPA, 427 U. S. 246 (1976)

This Court, in two cases which are regarded by the bench and bar as "seminal cases" involving the interpretation of the Clean Air Act of 1970, discussed the respective roles of the states and the federal government (EPA) in implementing the provisions of the Clean Air Act of 1970. With respect to the formulation of a state's SIP and its revisionary process, this Court held:

> "The agency (EPA) is plainly charged by the Act with the responsibility for setting the national

ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under § 110(a) (2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. *The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a) (2),* and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. § 110(c). *Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation. Train v. Natural Resources Defense Council, Inc.* (421 U. S. at 79-80) (emphasis supplied)

* * *

"The judgments which the Agency must make when passing on variances under § 110(a)(3) are whether the ambient air complies with national standards, and if so whether a proposed variance would cause a plan to fail to insure maintenance of those standards." (421 U. S. at 93) (emphasis supplied)

* * *

> *"Since a variance would normally implicate only the § 110(a)(2)(A) requirement that plans provide for attainment and maintenance of national ambient air standards, treatment as revisions would result in variances being readily approved in two situations:* first, where the variance does not defer compliance beyond the attainment date; and *second, where the national standards have been attained and the variance is not so great that a plan incorporating it could not insure their continued maintenance."* (421 U. S. at 77) (emphasis supplied)

Again, in *Union Electric Co. v. U.S. Environmental Protection Agency, supra,* this Court held:

> "Perhaps the most important forum for consideration of claims of economic and technological infeasibility is before the state agency formulating the implementation plan. *So long as the national standards are met, the State may select whatever mix of control devices it desires, Train v. NRDC, supra,* at 79, 43 L Ed 2d 731, 95 S Ct 1470, *and industries with particular economic or technological problems may seek special treatment in the plan itself.* Cf. 40 CFR §§ 51.2(b), (d) (1975); S Rep No. 91-1196, p 36 (1970). *Moreover, if the industry is not exempted from, or accommodated by, the original plan, it may obtain a variance, as petitioner did in this case; and the variance, if granted after notice and a hearing, may be submitted to the EPA as a revision of the plan."* (427 U. S. at 266) (emphasis supplied)

Thus, so long as the relevant AAQS are being met, *the state* — not EPA or a court (on review of EPA action) —

determines which sources may be given variances and what volume of pollutants they may emit.

The Court of Appeals here held to the contrary. On a record where it was uncontested that the relevant AAQS were being met, the Court nonetheless ruled that the Michigan Air Pollution Control Commission could not grant Dow the variance at issue (Consent Order No. 01-1979) and thereafter revise its SIP. The Court so held, stating:

> " . . . Dow is now emitting from its aging power plants 39,809 tons of SO_2 per year. Due to dispersion among a number of stacks and to relatively low pollution from other sources in the same county, Dow's emissions have not caused Midland County monitors to show violations of the national air quality standards.
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> * * *
>
> "This means, of course, that absent EPA's order, Dow's SO_2 pollutants will continue to damage the air and the environment both in Midland County and downwind therefrom until Consumer's [sic] nuclear plant comes on line." (App. 6)

However, as noted above, the emission of 39,809 tons of sulfur dioxide per year by Dow is no bar to approval of its SCS on an *interim* basis because the relevant AAQS were and are being met. By saying that a state may not authorize the emission of a given volume of sulfur dioxide when the relevant AAQS are being met, both EPA and the Court of Appeals arrogated to themselves a decision-making power specifically reserved by the Act to the state. *Train v. Natural Resources Defense Council, Inc., supra; Union Electric Co. v. U. S. Environmental Protection Agency, supra.*

Moreover, to the extent that the Court of Appeals looked to the possible impact of Dow's emissions somewhere "downwind" rather than directing its attention solely to the impact of Dow's emissions in the area of Midland County where Dow is located, such action was completely contrary to the provisions of the Clean Air Act as interpreted by this Court. In determining whether to approve a variance as a revision to a state SIP, this Court has expressly held that the Administrator is to determine whether or not the AAQS are being met *in the area where the source is located. Train v. Natural Resources Defense Council, Inc., supra; Union Electric Co. v. U. S. Environmental Protection Agency, supra.* The Act confers no authority on the Administrator (or a court) to reject a variance on the ground that the source's emissions, while not causing any violation of the AAQS in the area where the source is located, might cause unspecified "environmental damage"elsewhere in the country where the source's emissions may ultimately be carried.[7]

Unless this Court grants this Petition for Writ of Certiorari, the fundamental roles of EPA and the states under the Clean Air Act, as articulated in *Train v. Natural Resources Defense Council, Inc., supra,* and *Union Electric Co. v. U. S. Environmental Protection Agency, supra,* will be inalterably changed and the role reserved to the states irretrievably diminished. Moreover, the present requirements of the Clean Air Act which mandate that

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[7] While 42 U.S.C. § 7410(a)(2)(E) provides that a SIP must contain provisions to insure that a source's emissions do not prevent attainment or maintenance of AAQS in another state, there was no evidence in the record before EPA or the Court of Appeals in this case that Dow's emissions were causing or contributing to a violation of AAQS in any other state.

the Administrator, in reviewing a SIP revision request, determine the impact of the source's emissions in the area where the source is located will be effectively abrogated and the Administrator will be empowered to reject state-granted variances on the ground that, while the AAQS are being met in the area of the source and while its emissions are not causing any violation of AAQS in another state, the source's emissions "may" cause unspecified "environmental damage" somewhere else in the country.

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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NO. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

THE DOW CHEMICAL COMPANY,
a Delaware corporation,
Petitioner,
vs.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
and DOUGLAS M. COSTLE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX "A"

OPINION

(United States Court of Appeals
for the Sixth Circuit)

(Dow Chemical v. USEPA
Nos. 78-3139, 78-3595, 80-3260)

Decided and Filed December 9, 1980.

Before: Edwards, Chief Judge, Phillips and Peck, Senior Circuit Judges.

Edwards, Chief Judge. We deal here with three petitions filed by The Dow Chemical Company seeking review of decisions of respondent, United States Environmental Protection Agency, under the Clean Air Act, 42 U.S.C. § 7401 *et seq.* (Supp. II 1978). These decisions designated Midland County as a "nonattainment area" (Appeal Nos. 78-3139 and 78-3595) and refused to approve a state approved revision of Michigan's "State Implementation Plan" (Appeal No. 80-3260). These appeals were consolidated by order of this court when it became apparent that they presented basically the same issue.

We recognize at the outset that this case is not comparable to the many clean air petitions which have previously been heard by this court. In these prior cases, many industries have demonstrated obdurate resistance to the national effort to achieve national air quality standards. *Cincinnati Gas & Electric Co.* v. *EPA*, 578 F.2d 660 (6th Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *Cleveland Electric Illuminating Co.* v. *EPA*, 572 F.2d 1150 (6th Cir.), *cert. denied*, 439 U.S. 910 (1978).

In contradistinction, this record shows that even before the 1970 Clean Air Act was adopted, Dow Chemical laid plans for a permanent solution to its then and currently existing sulfur dioxide pollution problems. At the same time, Dow recognized that it would take years to achieve the permanent solution by which Dow committed itself to one-third participation in the building of Consumers Power's nuclear power plant to supply all the power needed for Dow's Midland plants. As a result, Dow also put in operation an alternative to the burning of high sulfur coal in its old power plants in the form of a Supplementary Control System (SCS) for temporary use of low sulfur oil on occasions when its

normal emission of SO_2 pollutants would otherwise occasion the atmospheric pollution in Midland County to exceed national air quality standards. The parties agree that this SCS, geared to 24-hours-a-day and 7-days-a-week meteorological control through satellite weather observation, has succeeded in preventing any monitor-recorded instance of actual violation of national air quality standards in Midland County during the interim years.

It is an interesting contrast to note that at least 20 counties and portions of counties in Ohio are listed by EPA as in violation of national air quality standards. In Michigan, EPA lists no county in the state, except Midland County, as in violation of national air quality standards, And Midland is in violation only because, according to United States EPA, Congress has refused to accept any intermittent or temporary remedial measures as effective for purposes of determining national air quality standards.

From this description of our current problem, it might be deduced that the panel which heard this case is inclined by its previous contrasting experiences toward exercise of any judicial discretion it might have favorably to Dow. While this is true, unfortunately for Dow, our review of this record and the applicable statutory provisions indicates that Congress, in the exercises of its legislative powers, has dealt specifically with the identical issue raised by Dow and has foreclosed judicial relief.

As we see the issues in these appeals, they should be phrased as follows:

1) Did Congress in the 1977 Amendments to the Clean Air Act prohibit consideration of any intermittent

system designed to reduce excessive pollution emissions temporarily in United States EPA's determination of achievement of national air quality standards?

2) If so, was it arbitrary and capricious for United States EPA to refuse to approve a revision to the Michigan State Implementation Plan to which the Michigan Air Pollution Control Commission had consented?

We answer the first of these questions in the affirmative and the second in the negative.

As to the first issue in this case, Dow claims basically that Midland County should have been and should now be designated as an "attainment area" because there have been no monitored violations since Dow began to use its supplementary low sulfur oil burning system. As indicated above, whatever logic this argument may have, United States EPA argues that Dow cannot be in compliance and that Midland County cannot be granted an attainment designation, since Dow does not *continuously* limit sulfur dioxide pollution from its stacks.

It is EPA's position, strongly disputed by Dow, that the 1977 Amendments to the Clean Air Act adopted by Congress were designed to clarify the 1970 Clean Air Act so as to show that national standards must be met by constant control of emissions.

As to this issue the confrontation between the parties is over whether or not Dow's SCS is in fact one which "limits the quantity, rate or concentration of emissions of air pollutants on a continuous basis. . . ." Dow also argues, however, that while "constant controls are the preferred means to obtain compliance," intermittent controls used on an interim basis are permissible where there is a showing that constant controls are

economically or technologically infeasible. *Citing Kennecott Copper Corp.* v. *Train*, 424 F. Supp. 1217 (D. Nev. 1976), *rev'd on other grounds sub nom., Kennecott Copper Corp.* v. *Costle*, 572 F.2d 1349 (9th Cir. 1978). In relation to this issue, the EPA cited and relied on *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975); *Kennecott Copper Corp.* v. *Train*, 526 F.2d 1149 (9th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); and *Big Rivers Electric Corp.* v. *EPA*, 523 F.2d 16 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976). As to these cases, Dow argues that they "expressly hold" that an interim system like Dow's can be used where there is no other "economically and/or technologically feasible alternative."

We do not atempt to resolve this dispute, since these cases were all decided before 1977 and in our view, Congress resolved the argument contrary to Dow's contention in the 1977 Amendments. 42 U.S.C. § 7602(k) (1978) now provides:

> The terms "emission limitation" and "emission standard" mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.

In addition, in 1977 Congress added a new Section 123(a) (42 U.S.C. § 7423(a)) stating that "[t]he degree of emission limitation required" by a SIP "shall not be affected in any manner" by the use of excessive stack heights or "any other dispersion technique," and a new Section 123(b) (42 U.S.C. § 7423(b)) defining "dispersion technique" to include *"any intermittent or supplemental control of air pollutants varying with atmospheric conditions."* (Emphasis added.)

We have read and considered the language relied on by Dow from House and Senate legislative history written prior to adoption of the 1977 Amendments. We recognize that some of the language relied upon by Dow does seem to conflict with what we believe to be the obvious and unambiguous language of the 1977 statutory provisions quoted above.

It is, however, a cardinal rule of statutory interpretation that the courts do not turn to legislative history to shed light on the meaning of easily understandable and unambiguous statutory enactments. *See Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979); *United States* v. *Oregon*, 366 U.S. 643, 648 (1961).

We do not believe that other sections of this complicated statute relied on by Dow convey discretion to United States EPA to approve as an SIP revision the Michigan Air Pollution Control Commission's grant of a variance under the facts recorded here. Dow is now emitting from its aging power plants 39,809 tons of SO_2 per year. Due to dispersion among a number of stacks and to relatively low SO_2 pollution from other sources in the same county, Dow's emissions have not caused Midland County monitors to show violations of national air quality standards.

The total quantity of Dow's emissions, however, is not being reduced — nor will it be — until 1984 at the *earliest*. This means, of course, that absent EPA's order, Dow's SO_2 pollutants will continue to damage the air and the environment both in Midland County and downwind therefrom until Consumer's nuclear plant comes on line. This appears to be the exact sort of fact situation which Congress had in mind in adopting the 1977 Clean Air Act Amendments. H.R. Rep. No. 294,

95th Cong., 1st Sess. 84-87, 128-33, *reprinted in* [1977] U.S. Code Cong. & Ad. News 1077, 1162-65, 1207-11. *See* Appendix following.

Since we find §§ 123(a) and (b) (42 U.S.C. §§ 7423(a) and (b) (1978)), to be clear and unambiguous, we hold that these amendments required the United States EPA's decision, and now require our approval thereof. The holding requires the answer we have already set forth to the two questions posed by this case.

The petitions for review are denied.

APPENDIX

HOUSE REPORT NO. 95-294

Interstate and Foreign Commerce Committee

May 12, 1977

(To accompany H.R. 6161)

* * *

The fundamental policy objections which have been raised to the use of tall stacks, intermittent or supplemental controls, and other dispersion techniques are as follows:.

1. *Even for the purpose of attaining and maintaining the national ambient air quality standards, these methods are of dubious reliability and enforceability.*

This point has been made repeatedly by many persons and groups. One of the groups which have expressed these doubts is the National Academy of Sciences. The NAS points out that the effectiveness of intermittent control systems depends on accurate meteorological forecasting; quick response to adverse air quality

readings; proper placement, maintenance, and calibration of monitors, among other factors.

* * *

2. *Intermittent control systems do not help to reduce the derivative pollutants of sulfur oxides (sulfates, sulfites, sulfuric acid) or oxides of nitrogen (nitrates, nitrites, nitric acid, nitrosamines); in conjunction with tall stacks, ICS may thus increase the health risks associated with SO_2 and NO_2 emissions.*

The Environmental Protection Agency has found — and the National Academy of Sciences has confirmed — that sulfates, sulfites, and sulfuric acid appear to be "more toxic than the parent compound [sulfur dioxide] and appear likely to be responsible for a substantial portion of adverse effects on health associated with stationary source combustion of fossil fuels." NAS has also found,

> * * * The application of tall stacks and/or intermittent control systems will not reduce total emissions of sulfur oxides to any significant degree; thus this strategy does not decrease the total amount of sulfate in the regional atmosphere.

Similarly, one of the papers contained in the HEW-NIEHS Rall Report, conducted at the request of the Office of Management and Budget concluded,

> In view of the possible toxicity of suspended sulfates, it should be noted that emission control measures designed to disperse sulfur dioxide from point sources, that is, tall stacks, will not have a major effect on suspended sulfate levels despite producing a decrease in local ambient sulfur dioxide concentration.

In fact, the same report expressed concern that "there is some evidence that local control of SO_2 (by higher stacks, and so forth) is leading to a wider dissemination of particulate sulfates."

The National Academy of Sciences has expressed even greater concern about the effects of tall stacks and intermittent controls for dealing with oxides of nitrogen than for SO_2. As the NAS explained,

> * * * Nitric oxide converts to nitric acid and nitrates faster than sulfur dioxide converts to sulfuric acid and sulfates; and since the reaction products precipitate, there is greater potential for local impact.

At least in part because of the adverse impact of these derivative pollutants, the National Academy of Sciences has recommended a compromise.

> The tall stack-ICS technology could be rejected as a permanent control technique on the basis of substantial potential risks associated with increased atmospheric loading of sulfur compounds. At the same time, the technology could be accepted for carefully defined situations as an interim control technique.

The Ford administration essentially agreed with these conclusions and recommendations. The Ford administration bill in 1975 (H.R. 2633) would have authorized the use of intermittent controls only on an interim basis; constant controls would have been required as a permanent or final compliance strategy. (H. 40, 156, 1181). Testimony from the State of Illinois agreed that intermittent controls should be permitted only on an interim basis. (H. 1308) Illinois' position is reflective of

that taken by the State and Territorial Air Pollution Program Administrators.

3. *Use of tall stacks spreads the pollution, subjects areas to risk which were not previously exposed, and exports the problem to other areas and States, where it is too late to control the pollution.*

This point was made by the National Institute of Environmental Health Sciences' Rall Report. The National Academy of Sciences has also expressed concern about the long-distance transport phenomenon, which is encouraged by use of tall stacks and intermittent controls.

Even in 1907, it was apparent that pollution must be reduced at its source if injury were to be avoided downwind. For the U.S. Supreme Court in that year held that the State of Georgia had a right to sue a smelter in Tennessee which was emanating sulfur dioxide fumes which then traveled across the States' shared border causing harm in Georgia.

> It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by surfurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. * * *
>
> The proof requires but a few words. It is not denied that the defendants generate in their works near the Georgia line large quantities of sulfur dioxide which becomes sulfurous acid by

> its mixture with the air. It is hardly denied and cannot be denied with success that this gas often is carried by the wind great distances and over tracts of Georgia land. On the evidence the pollution of the air and the magnitude of that pollution are not open to dispute * * * we are satisfied by a preponderance of the evidence that the sulfurous fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff State as to make out a case within the requirements of *Missouri* v. *Illinois*, 200 U.S. 496. * * *
>
> * * * the plaintiff now finds * * * that the tall chimneys in present use [since the complaint was filed] cause the poisonous gases to be carried greater distances than ever before and that the evil has not been helped.

In the committee's view, what Justice Holmes and the Supreme Court knew and explained in 1907 cannot be ignored nearly 70 years later. This is particularly so in light of the fact that the NAS and NIEHS reports of the most current scientific evidence confirm the knowledge of seven decades ago.

4. *If SO_2 and NO_2 emissions are merely dispersed by tall stacks and intermittent controls and are not reduced, these emissions will be converted to acid rain in significant amounts. Acid rain reduces soil productivity, harms vegetation, crops, buildings, and materials, and may jeopardize segments of the whole economy of certain areas.*

The increasing acidity of rainfall has been noted in many areas — England, Scotland, Norway, Sweden, Brazil, and the States of the Northeastern United States.

Cornell, Yale and Dartmouth scientists have documented this trend.

As the acidity of rainfall increases, the productivity of forest and agricultural lands are threatened. The 1972 report of the Swedish Government to the United Nations Conference on the Human Environment concluded that continued sulfur oxide emissions from England and Germany could reduce Swedish forest yields by 3-15 percent in the next 30 years.

Similar concerns have been expressed by the National Academy of Sciences. The concentration of both sulfates and nitrates in precipitation have increased in the past 20 years, and these increases appear to be associated with the increases in high level emissions (that is, emissions from tall stacks).

Furthermore, the NAS has predicted, that if sulfur oxide emissions are allowed to double between 1970-80, the average acidity of rain in the Northeast is likely to increase as much as 300 percent.

> Effects of acid rain on natural systems are probably of greater consequence than effects of sulfur dioxide, especially if emissions are permitted to increase* * *.
>
> Identifiable effects of acid rain include acidification of soil, reduction in forest productivity, and depletion of freshwater fish populations. The full impact of these effects may be delayed for years or even decades.* * *
>
> The possibility of large additional effects, such as extensive injury to valuable ornamental plants or reduction in agricultural productivity, cannot be dismissed, especially if the acidity of precipitation is permitted to increase* * *.

> The possibility of effects on weather and climate cannot be dismissed.

The NAS also concluded that acid rain could increase corrosion, damage materials, and reduce property values. Therefore it concluded, "These effects point to the desirability of controlling the amount of man-produced sulfur compounds emitted into the atmosphere."

H.R. Rep. No. 294, 95th Cong., 1st Sess. 82-86, *reprinted in* [1971] U.S. Code Cong. & Ad. News 1077, 1160-64 (footnotes omitted; emphasis in original).

APPENDIX "B"

EXCERPT FROM FEDERAL REGISTER

March 3, 1978 — Part II

[6560-01]

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

SUBCHAPTER C—AIR PROGRAMS

[FRL 856-5]

PART 81—AIR QUALITY CONTROL REGIONS, CRITERIA, AND CONTROL TECHNIQUES

Section 107—Attainment Status Designations

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: This rulemaking sets forth the attainment status of all States in relation to the national ambient air quality standards (NAAQS). The tables following this rulemaking indicate, on a State-by-State, pollutant-by-pollutant basis, the attainment status of every area as submitted by the appropriate State agency and approved, or as designated by the Environmental Protection Agency (EPA). No distinctions are made as to the severity of the violations recorded in the areas designated as nonattainment in these tables. These designations are immediately effective. EPA is soliciting comments for 60 days and will republish revised designations as appropriate.

DATES: Effective Date: Immediately. Comments Due: May 2, 1978.

ADDRESS: General comments on these designations should be addressed to Norman L. Dunfee, Chief, Control Programs Operations Branch (MD-15), Office of Air Quality Planning and Standards (OAQPS), Research Trangle Park, N.C. 27711.

Comments relative to specific State designations should be directed to the appropriate EPA Regional Office, contact as listed below:

Tom Devine, Chief, Air Branch, EPA Region I, JFK Federal Building, Boston, Mass. 02203 (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont).

William Baker, Chief, Air Branch, EPA Region II, 26 Federal Plaza, New York, N.Y. 10007 (New York, New Jersey, Puerto Rico, Virgin Islands).

Howard Heim, Chief, Air Branch, EPA Region III, Curtis Building, Sixth and Walnut Streets, Philadelphia, Pa. 19106 (Delaware, Maryland, Pennsylvania, Virginia, West Virginia, District of Columbia).

Tom Helms, Chief, Air Branch, EPA Region IV, 345 Courtland Street NE., Atlanta, Ga. 30308 (Alabama, Georgia, Florida, Kentucky, Mississippi, North Carolina, Tennessee, South Carolina).

Jack Chicca, Chief, Air Branch, EPA Region V, 230 South Dearborn Street, Chicago, Ill. 60604 (Indiana, Illinois, Michigan, Minnesota, Ohio, Wisconsin).

Jack Divita, Chief, Air Branch, EPA Region VI, 1201 Elm Street, Dallas, Tex. 75270 (Arkansas, Louisiana, Oklahoma, New Mexico, Texas)

Art Spratlin, Chief, Air Branch, EPA Region VII, 1735 Baltimore Street, Kansas City, Mo. 64108 (Nebraska, Iowa, Kansas, Missouri).

Robert DeSpain, Chief, Air Branch, EPA Region VIII, 1860 Lincoln Street, Denver, Colo. 80295 (Montana, Utah, North Dakota, South Dakota, Wyoming, Colorado).

Allyn Davis, Chief, Air Branch, EPA Region IX, 215 Fremont Street, San Francisco, Calif. 94105 (California, Nevada, Arizona, Hawaii, American Samoa, Northern Mariana Islands).

Clark Gaulding, Chief, Air Branch, EPA Region X, 1200 Sixth Avenue, Seattle, Wash. 98101 (Alaska, Washington, Oregon, Idaho).

FOR FURTHER INFORMATION CONTACT:

Norman L. Dunfee, USEPA, Research Triangle Park, N.C. 27711, phone 629-5226 (FTS) or 919-541-5226 (commercial).

SUPPLEMENTARY INFORMATION:

The Clean Air Act (CAA) Amendments of 1977 place additional requirements on the States and EPA. Among them, the Amendments added section 107(d), which directed each State, within 120 days after the Amendments were enacted, to submit to the Administrator a list of the NAAQS attainment status of all areas within the State. The Administrator was required under section 107(d)(2) to promulgate the State lists, with any necessary modifications, within 60 days of their submittal.

The States are now preparing revisions to their State implementation plans (SIPs) as required by sections 110(a)(2)(I) and 172 of the Act. This enterprise, which must be completed by January 1, 1979, requires that the States have immediate guidance as to the attainment status of the areas designated under section 107(d). Congress has acknowledged this by imposing a tight schedule on the designation process and requiring EPA to promulgate the list within 180 days of the enactment of the amendments. Under these circumstances it would be impracticable and contrary to the public interest to ignore the statutory schedule and postpone publishing these regulations until notice and comment can be effectuated. For this good cause, the Administrator has made these designations immediately effective.

The Agency recognizes, however, the importance of public involvement in the designation process. It is therefore, soliciting public comment on this rule by May 2, 1978.

Comments received will be considered carefully and revisions to the designations will be made where appropriate. The criteria used in making these designations include the following.

Air Quality Data

Section 107(d) of the CAA specified that designations should be based upon air quality levels as of enactment of the Amendments (August 7, 1977). States were required by EPA guidance to consider the most recent four quarters of monitored ambient air quality data available. If this data showed no standards violations, then the previous four quarters of monitoring data were to be examined to assure that the current indication of attainment was not the result of a single year's data reflecting unrepresentative meteorological conditions. In the absence of sufficient monitored air quality data, other evaluation methods were used, including air quality dispersion modeling.

Geographic Size

The Act specified that the designation areas could be based on air quality control regions (AQCRs) or any subportions of these areas. EPA advised States they could divide AQCRs into various nonattainment, attainment, or unclassified portions, i.e., county, subcounty, or other geographic areas as long as the area could be clearly defined in a written narrative. Additionally, a different geographic area could be used in designating the status for each pollutant.

Pollutant Specific Considerations

Subsections 107(d)(1) (A)–(E) of the CAA Amendments specified the possible categories for area designations. For both total suspended particulates (TSP) and sulfur dioxide (SO_x), an area could be designated as: (1) Not meeting the primary NAAQS, (2) not meeting the secondary NAAQS, (3) unclassifiable, and (4) attainment. For carbon monoxide (CO), photochemical O_x, and nitrogen dioxide (NO_x), designations of: (1) Not meeting the primary NAAQS, and (2) attainment/unclassified were possible. The attainment

and unclassified designations for CO/O_3/NO_2 are combined into one column for the tables presented in this notice because both designations are set forth by subsection 107(d)(1)(E) of the CAA. No designations regarding the secondary NAAQS for these pollutants were necessary since the primary standards and secondary standards are identical.

The criteria used in designation of the status of each pollutant used in addition to ambient air quality data is discussed below:

Photochemical Oxidants

There are 105 urban areas in the United States with populations greater than 200,000. These major urban areas (except Honolulu, Hawaii, and Spokane, Wash.) are where the oxidant problem is most severe. Honolulu has recorded eight consecutive quarters of data without a violations justifying and attainment designation. There is sufficient uncertainty regarding conditions in Spokane to warrant an unclassifiable designation for the present time. The other 103 urban areas, where over 100,000,000 people reside, consistently experience photochemical oxidant levels above the NAAQS. Due to these factors, higher priority is being given in the SIP planning process to these urban areas. Of these, only six urban areas do not have oxidant ambient air quality monitoring data. The other 97 urban areas experienced oxidant violations based on ambient data. Since 97 of the 105 urban areas greater than 200,000 with monitoring data recorded violations, the six cities without data were presumed to be nonattainment for oxidants.

Additionally, a comprehensive analysis was performed by OAQPS and other factors considered by EPA for each of the six urban areas. These analyses substantiated the presumptive nonattainment designation and these areas will be required to monitor during the 1978 oxidant season (summer-fall) to determine the magnitude of their oxidant problem.

Total Suspended Particulates

Given the spatially limited nature of TSP violations, no general area size criteria were possible. However, States were advised that designations along political boundaries such as city limits or county lines were practical from an air quality management standpoint.

The problem of designating for rural fugitive dust areas required special consideration. EPA's fugitive dust policy recognizes the generally greater health impact due to fugitive dust in urban areas in contrast to rural areas. In urban areas, the windblown soil contains various manmade toxic pollutants. But, rural windblown dust is usually not significantly contaminated by industrial pollutants. Therefore, for the purposes of these designations, any rural areas experiencing TSP violations which could be attributed to fugitive dust could claim attainment of the TSP NAAQS. Rural areas for this purpose are defined as those which have: (1) A lack of major industrial development or the absence of significant industrial particulate emissions, and (2) low urbanized population densities.

Carbon Monoxide

A designation of nonattainment for the entire urban core area of a city experiencing monitored CO violations was desirable, but smaller area designations were acceptable since CO violations are most pervasive in downtown areas of high traffic density.

Sulfur Dioxide and Nitrogen Dioxide

Generally where EPA promulgated a designation for SO_2, the minimum area was to be the county in which the violating monitoring site was located. If States had monitoring data to substantiate the size areas they designated, they would be acceptable by EPA regardless of size.

Air Quality Control Region (AQCR) Redesignations

Section 107 of the CAA also provided for redesignation of the existing AQCR boundaries where a State determined that the redesignated areas would promote more efficient air quality management. Several States exercised this option in defining their designation areas. Part 81 under Title 40 of the Code of Federal Regulations presently contains descriptions of all existing AQCRs and these descriptions, where feasible, will be modified in a future Federal Register notice to reflect the State revisions. The exact descriptions of all AQCR boundaries are available from either the appropriate State or EPA Regional Office.

Effect of the Designations

Section 107(d)(1)(A)-(E) sets out attainment status categories to which reference is made in Parts C (Prevention of Significant Deterioration (PSD)) and D (Nonattainment) of the CAA. Section 171(2) in Part D defines "nonattainment area" to include any area identified under subparagraphs 107(d)(1) (A)-(C), while giving the Administrator authority to add other areas based on monitoring or calculations. Similarly, areas designated under subparagraphs 107(d)(1) (D) or (E) are described in section 161, Part C, as PSD areas.

The section 107(d) designations are meant to provide a starting point for States in their efforts to correct existing air quality problems and to implement programs under the 1977 CAA Amendments. For example, a designation as a nonattainment area, in general, means that an applicable SIP must be revised, pursuant to section 172, to provide for attainment of the NAAQS as expeditiously as practicable, but not later than December 31, 1982 (December 31, 1987, under certain conditions for photochemical oxidants and/or carbon monoxide). Under section 172(b)(6) the revised SIPs must require permits, in accordance with the provisions of section 173, for the construction and operation of major new or modified stationary sources. To be approved by the Administrator under section 110(a)(2)(I), a SIP must contain a prohibition against major new source construction in nonattainment areas after June 30, 1979, where emissions from the source would contribute to increases in pollutants for which a NAAQS was being exceeded, unless the SIP meets the requirements of Part D at the time of the permit application. Under section 129 of the Amendments, EPA's emission offsets policy, as modified, continues to apply to major new source construction in nonattainment areas prior to July 1, 1979.

But the designation of an area as nonattainment or attainment must be considered only a point of departure and not a final, inflexible end in itself. The designations will have only limited significance for new source preconstruction review, for three reasons. First, new sources, wherever they propose to locate, must be reviewed for their impact on all nearby areas as well as that in which they would locate. If an area on which a new source would impact is designated differently than the one in which it is locating, the designation of the latter would not necessarily determine the rules to which the source would be subject. Second, PSD rules apply in any area where at least one NAAQS is attained, and since virtually every area in the country shows attainment for at least one pollutant, the PSD review will be a requisite virtually everywhere. Finally, case-by-case new source review is necessitated to account for the possibility that an area with a particular designation may encompass "pockets" which do not fit that designation.

These section 107(d) designations are subject to revision under Section 107(d)(5) whenever sufficient data is available to warrant a redesignation. Both the State and EPA can initiate changes to these designations, but any State redesignation must be submitted to EPA for concurrence. EPA will promulgate any revised list in accordance with the requirements for this initial promulgation.

EPA Review

The State submittals were reviewed by EPA for consistency with the criteria set forth in this notice. Where EPA differed with a State designation, section 107 of the CAA provides that EPA should notify the State and allow the submission of additional information. If EPA and the State could not reach agreement, an EPA designation would replace the State submitted designation. Also, in the case where a State failed to designate for any State or portion thereof the EPA would designate for the State as needed.

EPA considered all available monitoring data where it was determined to be valid. All EPA designations contained in the following tables were made within the criteria contained in this notice except in a limited number of cases where the State designations were replaced by unclassifiable designations by the appropriate Regional Offices on the basis that a major source in each county was utilizing a possibly unauthorized dispersion technique. Since EPA has not finalized its tall stack policy regulations to implement Section 123, it is presently unknown whether the sources can claim full credit for their existing stacks.

EPA designations are indicated in the following tables by the asterisks accompanying the designations: * means a Federal EPA designation replaced a State recommendation. This * is used where either the designation status or the area size was modified by EPA: ** means solely a Federal designation where a State failed to submit their own recommendation. In some instances, the descriptions of the designated areas submitted by the States were so lengthy as to prohibit their publication in the limited space available in the tables presented below. Exact descriptions of all areas designated are available at the appropriate Regional Offices or the State in question. In some of the following tables, States referenced AQCRs by their appropriate number instead of their title. An Appendix A is included in the regulatory section of this rulemaking which gives both the AQCR name and number for ease of reference.

A summary of the approved designations for the 3215 counties or county equivalents covered by these designations is presented below:

	TSP	SO_2	CO	O_3	NO_2
Number of counties either totally or partially approved or designated by EPA as nonattainment	421	101	190	807	8

Dated: February 23, 1978.

DOUGLAS M. COSTLE,
Administrator.

Part 81 of Chapter I, Title 40 of the Code of Federal Regulations is amended by adding Subpart C and Appendix A as follows:

Subpart C—Section 107 Attainment Status Designations

Sec.
81.300 Scope.
81.301 Alabama.
81.302 Alaska.
81.303 Arizona.
81.304 Arkansas.
81.305 California.
81.306 Colorado.
81.307 Connecticut.
81.308 Delaware.
81.309 District of Columbia.
81.310 Florida.
81.311 Georgia.
81.312 Hawaii.
81.313 Idaho.
81.314 Illinois.
81.315 Indiana.
81.316 Iowa.
81.317 Kansas.
81.318 Kentucky.
81.319 Louisiana.
81.320 Maine.
81.321 Maryland.
81.322 Massachusetts.
81.323 Michigan.
81.324 Minnesota.
81.325 Mississippi.
81.326 Missouri.
81.327 Montana.
81.328 Nebraska.
81.329 Nevada.
81.330 New Hampshire.
81.331 New Jersey.
81.332 New Mexico.
81.333 New York.
81.334 North Carolina.
81.335 North Dakota.
81.336 Ohio.
81.337 Oklahoma.
81.338 Oregon.
81.339 Pennsylvania.
81.340 Rhode Island.
81.341 South Carolina.
81.342 South Dakota.
81.343 Tennessee.
81.344 Texas.
81.345 Utah.
81.346 Vermont.
81.347 Virginia.
81.348 Washington.
81.349 West Virginia.
81.350 Wisconsin.
81.351 Wyoming.
81.352 American Samoa.
81.353 Guam.
81.354 Northern Mariana Islands.
81.355 Puerto Rico.
81.356 U.S. Virgin Islands.

APPENDIX A—Air Quality Control Regions (AQCR's).

AUTHORITY: Secs. 107, 301 of the Clean Air Act, as amended (42 U.S.C. 7407, 7601).

Subpart C—Section 107 Attainment Status Designations

§ 81.300 Scope.

Attainment status designations as approved or designated by the Environmental Protection Agency (EPA) pursuant to Section 107 of the Act are listed in this subpart. Area designations are subject to revision whenever sufficient data becomes available to warrant a redesignation. Both the State and EPA can initiate changes to these designations, but any State redesignation must be submitted to EPA for concurrence.

Massachusetts - CO

Designated Area	Does Not Meet Primary Standards	Cannot Be Classified or Better Than National Standards
Berkshire AQCR		
All cities and towns		X
Central Massachusetts AQCR		
Worcester	X	
All cities and towns		X
Merrimack Valley AQCR		
Lowell	X	
All other cities and towns		X
Metropolitan Boston AQCR		
Boston	X	
Cambridge	X	
Medford	X	
Waltham	X	
All other cities and towns		X
Pioneer Valley AQCR		
Springfield	X	
All other cities and towns		X
Southeastern Massachusetts AQCR		
All cities and towns		X

Massachusetts - NO_2

Designated Area	Does Not Meet Primary Standards	Cannot Be Classified or Better Than National Standards
Statewide		X

§81.323 Michigan.

Michigan - TSP

Designated Area	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Cannot Be Classified	Better Than National Standards
AQCR 82 (Michigan Portion) Except sub-areas defined by range and township numbers:				X
1. Berrien County R18W, T4S, Sections 7, 8, 17-20, 29, 30 R19W, T4S, Sections 12-14 & 23-27		X		
AQCR 122 Except sub-areas defined:				X
1. Bay County R5E, T14N, Sections 14-16 & 21-23		X		
2. Genesee County a. Starting at intersection of Stewart Av. and N. Saginaw St. then E. along Stewart Av. to Dort Highway to Franklin Av. to Hamilton Av. to Saginaw St. to Stewart Av.	X*			
b. Starting at intersection of Carpenter Rd. and DuPont St. then E. on Carpenter Rd. to Center Rd. then S. to M-21 then E. to I-475 to Bristol Rd. then W. to I-75 then N. to Corunna Rd (M-56) then E. to Flint city limits then S. to Pasadena Av. then E. to DuPont St. to Carpenter Rd.		X*		

*EPA designation replaces State designation

Michigan - TSP (continued)

Designated Area	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Cannot Be Classified	Better Than National Standards
3. Kent County R11W, T7N, Sections 19, 30, 31 R12W, T7N, Sections 22-27 & 34-36		X		
4. Mason County R16W, T18N, Sections 13, 14, 23 & 24		X		
5. Midland County R2E, T14N, Sections 13-15, 21-23, 26-28 & 33-35		X		
6. Muskegon County R16W, T9N, Sections 21, 22 & 27-34		X		
7. Saginaw County a. R5E, T21N, Sections 1, 12-15, 22-27 & 34-36 R5E, T12N, Sections 4-6, 9, 16, 19-21 & 28-33		X		
b. R5E, T12N, Sections 7, 8, 17 & 18	X			
AQCR 123 Except sub-areas defined:				X
1. Macomb County a. R14E, T4N, Sections 247, 28, 33, & 34		X		
b. All of County South of 20 Mile Rd.		X		

Michigan - TSP (continued)

Designated Area	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Cannot Be Classified	Better Than National Standards
2. Oakland County a. R10E, T3N, Sections 15, 16, 21, 22, 27 & 28		X		
b. Area included within: Coolidge Rd. 10 Mile Rd. Campbell Rd. 14 Mile Rd. Dequindre Rd. & 8 Mile Rd.		X		
1. St. Clair County R17E, T6N Sections 2-4, 9-11, 14-16, 21, 22 & 28		X		
4. Wayne County a. Area included within: Lake St. Clair 8 mile Rd. to Schaeffer Rd. to McNichols Rd. to Greenfield Av. to Evergreen Rd. to Joy Rd. to Telegraph Rd. to Ford Rd., to Beech-Daly Rd. to Cherry Hill Rd. to Inkster Rd. to Carlysle St. to Middle Belt Rd. to Van Born Rd. to Wayne Rd. to Ecorse Rd. to Haggerty Hwy. to Tyler Rd. to Belleville Rd. to I-94 to Rawsonville to Oakville - Waltz Rd. to Will-Carlton Rd. to the Huron River to Lake area except for the subarea under b.		X		

Michigan - TSP (continued)

Designated Area	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Cannot Be Classified	Better Than National Standards
b. Area included within: Lake St. Clair-Monroe Rd. to 7 Mile Rd. to Van Dyke Rd. to 8 Mile Rd. to Wyoming Rd. to 7 Mile Rd. to Schaffer Rd. to Fenkell Rd. to Greenfield Av. to Joy Rd. to Southfield Expressway to Ford Rd. to Cherry Hill Rd. to Beech-Daly Rd. to Michigan Av. to Inkster Rd. to Carlysle St. to Middle Belt Rd. to Sibley Rd. to Telegraph Rd. to King Rd. to Grange Rd. to Sibley Rd. to Jefferson Av. to Bridge St. (Grosse Ile) extended to Detroit River)	X			
AQCR 126 (Michigan Portion Except sub-area defined by following townships: 1. Monroe County Exeter Ash, Berlin, Raisinville, Monroe & Frenchtown Townships including all incorporated municipalities		X		X
AQCR 125 Except sub-areas defined: 1. Branch County R6W, T6S, Section 22 2. Calhoun County R4W, T2S, Section 34 3. Ingham County R2W, T4N, Sections 2-11 & 14-23	X	X X		A

Michigan - SO_2

Designated Area	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Cannot Be Classified	Better Than National Standards
AQCR 82 (Michigan portion)				X
AQCR 122				
Except sub-areas defined:				X
1. Ingham County	X*			
2. Midland County	X*			
AQCR 123				X
AQCR 124 (Michigan portion)				X
AQCR 125				X
AQCR 126				X

* *EPA designation replaces State designation

Michigan - TSP (continued)

Designated Area	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Cannot Be Classified	Better Than National Standards
4. Washtenaw County Area near Ypsilanti within Cross St., Huron St., Harris Rd. & I-94		X		
AQCR 126				X
1. Delta County R22W, T39N, Sections 6-8, 17-20, 29-30				
R23W, T39N Sections 1, 12, & 13		X		
2. Emmet County R6W, T34N Sections 1-3 & 9-12				
3. Manistee County R16W, T21N, Sections 7, 18 & 19		X		
R17W, T21N, Section 12 & 13		X		
4. Marquette County R25W, T48N Section 1 & 2			X	

Michigan - O_3

Designated Area	Does Not Meet Primary Standards	Cannot Be Classified or Better Than National Standards
AQCR 82 (Michigan portion)	X	
AQCR 122		
Except sub-area defined:		X
1. Muskegon, Ottawa, Allegan, Kent, Montcalm, Ionia, Gratiot, Midland, Bay, Saginaw, Shiawassee, Genesee, Tuscola, Lapeer, Sanilac and Huron Counties	X	
AQCR 123	X	
AQCR 124 (Michigan portion)	X	
AQCR 125	X	
AQCR 126		
Except sub-area defined:		X
1. Marquette County	X*	

*EPA designations replace State designations

Michigan - CO

Designated Area	Does Not Meet Primary Standards	Cannot Be Classified or Better Than National Standards
AQCR 82 (Michigan portion)		X
AQCR 122		
Except sub-area defined:		X
1. Saginaw County R4E, T12N Sections 1, 12, 13, & 24 R5E, T12N Sections 4-9, 16-21	X	
AQCR 123		
Except sub-area defined:		X
1. Macomb, Oakland, Wayne Counties Lake St. Clair - 14 Mile Rd. to Kelly Rd. N. to 15 Mile Rd. to Hayes Rd. S. to 14 Mile Rd. to Clawson northern city boundary to Royal Oak northern city boundary to 13 Mile Rd. to Evergreen Rd. to Beverly Hills southern city boundary to Bingham Farms southern city boundary to Franklin southern city boundary to Inkster Rd. to 8 Mile Rd. to Livonia western city boundary to Wayne western city boundary to Romulus southern city boundary following Pennsylvania Rd. to Detroit River.	X	
AQCR 124 (Michigan portion)		X
AQCR 125		X
AQCR 126		X

§81.324 Minnesota.

Minnesota - 24F

Designated Area	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Cannot Be Classified	Better Than National Standards
AQCR 131	1*			
City of International Falls	1			
City of Duluth	1*			
City of Red Wing		1		
City of E. Grand Forks		1		
City of Cloquet		1		
City of Silver Bay		1		
Nashi Iron Range identified by county and township and range numbers:		1		
Itasca County T55N, R24-26W T54N, R22-25W T57N, R22-23W				
St. Louis County T57N, R12-21W T58N, R14-21W T59N, R13-13W T6-N, R12-13W				
Sherburne County			1	
St. Cloud Township (Stearns County)			1	
City of Springfield and Burnstown Township (Brown County)			1	
Remainder of State				1

*EPA designation replaced State designation

Michigan - MI2

Designated Area	Does Not Meet Primary Standards	Cannot Be Classified or Better Than National Standards
State of Michigan	1	1

EXCERPT FROM FEDERAL REGISTER

March 26, 1980

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL 1445-7]

Approval and Promulgation of Implementation Plans; Disapproval of Proposed Revision to Michigan Plan

AGENCY: Environmental Protection Agency.

ACTION: Disapproval of proposed revision.

SUMMARY: This action disapproves a proposed revision to the Michigan State Implementation Plan (SIP) submitted to the U.S. Environmental Protection Agency (USEPA) by the Michigan Department of Natural Resources (MDNR) pursuant to Section 110(a)(3) of the Clean Air Act, 42 U.S.C. 7410(a)(3). The revision, in the form of a Final Order issued February 13, 1979 by the Michigan Air Pollution Control Commission (MAPCC), proposed to extend the compliance date to December 31, 1982 for Dow Chemical Company (Dow) of Midland, Michigan to meet the State emission limits for the sulfur dioxide, particulate matter, and visual emissions. In order to control emissions before December 31, 1982 the Order permitted Dow to utilize a Supplementary Control System (SCS).

FOR FURTHER INFORMATION CONTACT: Gary Gulezian, Acting Chief, Regulatory Analysis Section, Air Programs Branch, United States Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 60604 (312) 886-6053.

SUPPLEMENTARY INFORMATION:

I. Background

On February 14, 1979 the Michigan Air Pollution Control Commission (MAPCC) submitted to USEPA a proposed revision to Michigan's State Implementation Plan (SIP). The revision was in the form of a Final Order issued by MAPCC after Dow and the MDNR had entered into a Stipulation for Entry of a Consent Order.

In the Consent Order Dow acknowledged "that it is presently the source of the emissions which result in all significant ambient air concentrations of sulfur dioxide in and around Midland, Michigan," and agreed with the MAPCC that "Federal Ambient Air Quality Standards for sulfur dioxide are presently being met in and around Midland, Michigan, because of the operation of an SCR [Supplementary or Intermittent Control System] by Dow." Supplementary or Intermittent Control Systems are described in the Order as "systems which limit the rate of pollutant emissions during periods when meterological conditions conducive to ambient ground level concentrations in excess of levels specified in subparagraph (iii) are anticipated." The ambient ground level concentrations specified in subparagraph (iii) are the same as the National Ambient Air Quality Standards (NAAQS) for sulfur dioxide (a running 24-hour average of 0.14 ppm, an annual arithmetic mean of 0.03 ppm, and a running 3-hour average of 0.50 ppm) with the exception that no exceedances are allowed. In order to keep from exceeding these concentrations, subparagraph (iii) of the Order provides further that "Dow shall utilize low sulfur fuel, load reduction, plant shut down, or other measures * * *" The Order provided that by December 31, 1982, Dow would be in continuous compliance with the present State emission standards through the purchase of process steam and electricity or by burning fuel which

would result in compliance; but, until that time Dow would be exempt from the State emission limitations for sulfur dioxide, particulates and opacity.

At the present time the federally-approved Michigan Implementation Plan provides that Dow achieve compliance with sulfur dioxide emission standards by July 1, 1975, and with particulate emission standards by April 1, 1975. See 40 CFR 52.1175(d).

On May 17, 1974 Dow and MAPCC entered into a Consent Order which provided that Dow could temporarily operate a SCS until July 1, 1980, to meet NAAQS for sulfur dioxide; that, until July 1, 1980, Dow was exempt from the State emission limitations for sulfur dioxide (SO_2) and, that Dow would, in the interim, purchase and install equipment on its coal-fired boilers so as to enable Dow to shift the use of fuels from coal to oil or natural gas when it was determined through the use of its SCS that the weather was conducive to ground level concentrations in excess of NAAQS. This Consent Order was never submitted to USEPA as a SIP revision.

On July 21, 1977, Dow and MAPCC entered into a new Consent Order. This Order authorized Dow to continue operation of its existing system (switching from coal to oil or gas when meteorological conditions conducive to ground level concentrations in excess of NAAQS exist) until July 1, 1980, at which time Dow agreed to eliminate coal as a fuel in its power plants and substitute compliance fuels, primiarly oil.[1] The 1977 Consent Order was the subject of litigation (*Dow Chemical v. Costle*, No. 78-10019, E.D. Mich.), wherein the District Court determined that the review of the Consent Order as a proposed SIP revision by USEPA could not be accomplished until the MAPCC had completed the record and submitted it to USEPA for review. Instead of completing the record for the 1977 Consent Order, Dow and the MAPCC entered into negotiations for a new Consent Order and on February 14, 1979 Consent Order APC No. 01-1979 was formally submitted by MAPCC to USEPA as a proposed SIP revision.

In August 1977, Congress amended the Clean Air Act (Act) to require the designation of areas in each state where the National Ambient Air Quality Standards (NAAQS) for total suspended particulates (TSP), sulfur dioxide (SO_2), carbon monoxide (CO), photochemical oxidents (ozone), and nitrogen dioxide (NO_2) were not being met. See Section 107(d) of the Act, 42 U.S.C. § 7407. An area in Midland County, Michigan, where Dow is located, was designated as a nonattainment area for both the primary and secondary SO_2 NAAQS and for the secondary TSP NAAQS. See 43 FR 8892, dated March 3, 1978, and 43 FR 45993 dated October 5, 1978. Thereafter, the State of Michigan submitted its part D implementation plan to attain and maintain sulfur dioxide and particulate NAAQS in the nonattainment areas. In its submittal the State indicated that its part D control strategy for SO_2 nonattainment areas was to eliminate supplemental control systems and to require "constant emission control systems."[2] This was to be accomplished by Consent Orders, such as APC No. 01-1979 previously submitted February 14, 1979, to USEPA as a proposed SIP revision. USEPA's review of Order No. 01-1979 as a part D SIP review is the subject of a separate notice of proposed rulemaking published 45 FR 9752 (February 13, 1980).

[1] Comments by the Dow Chemical Company, August 2, 1978, p. 6.

[2] State of Michigan Air Quality Implementation Plan dated May 1, 1979, p. 5-2.

On June 19, 1979 USEPA published at 44 FR 35263 a Proposed Disapproval of the proposed site specific SIP revision on the basis that the Consent Order did not contain constant control devices for the continuous reduction of emissions but, instead, permitted Dow to vary its emissions of sulfur dioxide and particulates according to atmospheric conditions.

II. Public Comments

In response to the proposed disapproval of the proposed SIP revision comments were received from Dow Chemical Company and from the American Lung Association of Michigan. Dow's comments urged approval of the proposed SIP revision and made the following arguments:

1. The proposed revision is approvable because it meets the requirements of Sections 110(a)(2) and Sections 302(k) and (m) of the Clean Air Act.

2. In the event that Dow's system is determined to be a SCS and barred by Section 123 of the Act as a final means of compliance, Section 123 does not bar the use of the SCS as an interim means of compliance.

3. The designation of the Midland, Michigan area as a nonattainment area for sulfur dioxide and particulate NAAQS is in error.

4. The proposed revision should be approved because of equitable considerations.

5. Since the supplementary control system enables Dow to keep from violating NAAQS, "no significant health effects would be presented by controlling Dow-Midland sulfur dioxide emissions below the SCS level." [3]

[3] Health and Welfare Benefits of Continuous Control of Sulfur Dioxide emissions, prepared for Dow Chemical Co., November 17, 1978.

The comments of the American Lung Association of Michigan supported disapproval of the Consent Order as a SIP revision and stressed the following points:

(1) The Order is contrary to law in that it permits reliance on a SCS for control of emissions from the Dow-Midland complex.

(2) The period during which Dow is permitted to use the SCS to control emissions does not qualify as an interim period under the Clean Air Act or case law.

(3) The Consent Order does not satisfy the SIP requirements of Section 172 of the Clean Air Act for nonattainment areas.

(4) The Consent Order does not provide for adequate emission monitoring for enforcement purposes.

(5) It would be inequitable to approve the Consent Order as a SIP revision.

As set forth below, the comments of Dow do not justify approval of the Consent Order as a SIP revision.

1. Requirements of Section 110(a)(3)(A) and Sections 302(k) and 302(m) of the Clean Air Act

A. Section 110(a)(3)(A) of the Clean Air Act provides for approval of SIP revisions by the Administrator if the revision "meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings." Paragraph (2) refers to Section 110(a)(2) which requires in subparagraph (B) that the revision contain "emission limitations * * * and such other measures as may be necessary to insure attainment of such primary or secondary standard * * *." Section 302(k) defines "emission limitation" and "emission standard" as "a requirement * * * which limits the quantity, rate or concentration of

emissions of air pollutants on a continuous basis * * *;" and Section 302(m) defines "means of emission limitation" as "a system of continuous emission reduction (including the use of specific technology or fuels with specified pollution characteristics)."

Although Dow and the MAPCC continuously refer to Dow's means of emission limitation as a Supplementary Control System,[4] Dow claims in its comments that Dow's system is not a SCS and that the Consent Order contains a proper "emission limitation" in that it establishes a "concentration" of pollutant which Dow is required to achieve. The "emission limitation", and/or "concentration", in the Consent Order are the primary and secondary National Ambient Air Quality Standards for sulfur dioxide with the exception that any exceedance of the Standards is considered a violation. Dow comments further that its system is not a SCS because it reduces emissions and insures continuous compliance with the NAAQS numerical limitations.[5]

Dow describes its SCS as a process by which information from eight SO_2 analyzers located in the City of Midland, from meteorological instruments in a tower located near the company, and from its boiler operation are fed into a computer which provides data to a consultant in Boston. The consultant uses this information to forecast the air quality impact of Dow's planned boiler operations. When the consultant determines which fuel must be burned in order to maintain NAAQS under the meteorological conditions in Midland, the information is sent back to the Dow computer for transmission to the Dow Utilities Control Room. The individuals in charge of the boiler operations then switch certain boilers to the fuel necessary to maintain NAAQS. Dow, in its comments stressed the ability of its SCS to keep Dow from violating NAAQS and alleged that because of this effectiveness Dow's SCS was not the type of SCS that Congress intended to ban by adding Section 123 of the Clean Air Act.

The Act requires more than continuous compliance with the NAAQS. Section 110(a)(2)(B) requires the use of emission limitations to insure attainment and maintenance of the NAAQS. Emission limitation, as defined in Section 302(k) and 302(m) of the Act requires "continuous emission reduction." Under Section 123 of the Act, the degree of emission limitation required to meet the standards cannot be affected by a dispersion technique.

It is USEPA's determination, that Dow's system does not require continuous emission reduction and that it is designed so as to allow Dow to vary the fuel mix used by its boilers to the extent that it is necessary to keep from exceeding NAAQS.[6]

[4] Consent Order APC No. 1-1979 and Dow's Comments dated August 2, 1979.

[5] The concentration levels in the Consent Order will be referred to as to NAAQS hereafter for purposes of brevity although it is understood that the difference between the requirements in the Consent Orders and NAAQS is that the Consent Order states that any exceedance of the 24-hour standard is a violation, whereas NAAQS permit one exceedance of the 24-hour and 3-hour standards before the exceedances are considered a violation.

[6] See Dow's comments (July 20, 1979, p. 6) "This mixture of fuel varies as the concentration of the pollutant varies so that at no time is the limitation [SO_2 NAAQS] violated."

Such a system is a "dispersion technique" as described in Section 123 of the Act, i.e., "any intermittent or supplemental control of air pollutants varying with atmospheric conditions", and thus cannot be considered in determining the degree of emission limitation that Dow is required to meet. Furthermore, the Consent Order states that "Dow and the Commission agree that Federal Ambient Air Quality Standards are being met in and around Midland, Michigan, because of operation of an SCS by Dow."

Dow comments that the use of fuels may be a means of emission limitation. For the use of fuels, however, to be a proper means of compliance, the proposed SIP revision must identify the specific fuel mix to be used and include a demonstration that use of specific fuels at maximum operating conditions and "worst case" meteorology would not cause a violation of the NAAQS for either sulfur dioxide or particulates.

The proposed SIP revision that MAPCC has submitted to USEPA for approval/disapproval is deficient in tha it contains no demonstration that the sulfur dioxide and particulate NAAQS would be protected without the use of Dow's SCS, a "dispersion technique."

B. Dow comments that the proposed revision contains a proper emission limitation because Dow cannot exceed the SO_2 NAAQS. Dow claims this limitation [NAAQS] is a "concentration of pollutant which Dow is required to achieve and thus is an "emission limitation" which meets the requirements of Sections 110(a)(2) and 302(k) of the Act. It is USEPA's position that the Clean Air Act not only requires compliance with the national ambient air quality standards, which are ground level concentrations, but also with emission limitations, which limit the amount of pollutants emitted by a source (42 U.S.C. 7410(a)(2) (A) and (B). Emission limitations, as applied to a source, must "assure continuous emission reduction" 42 U.S.C. 7602 (k) and (m). Dow is required to comply with both ground level concentrations (ambient standards) and emission limitations designed to attain the ambient standards. Compliance by Dow with ground level concentrations of the SO_2 NAAQS does not constitute compliance with its emission limitation in the federally approved SIP. The Order which requires only compliance with the ground level concentrations of the SO_2 NAAQS does not meet the statutory requirements of Section 110(a)(2)(B) (42 U.S.C. 7410(a)(2)(B)).

The proposed revision is also deficient in that it does not contain any emission limitations for particulates or visual emissions.

2. Interim Use of Supplementary Control Systems

Dow comments on page 3 of its July 20, 1979 counsel's letter to USEPA that "Regardless, therefore, of whether the System is continous means of emission control, EPA should permit the use of it in the interim;" and that nothing in the Clean Air Act nor case law prohibits the use of SCS on an interim basis. In support of its position Dow cites several cases decided prior to the 1977 Amendments. Congress was aware of those cases when it passed the 1977 Amendments and chose to narrow substantially the circumstances where dispersion techniques were permissible..

USEPA has stated that "apart from the limited circumstances of sections 113(d) and 119, and the narrow exceptions of Section 123, dispersion technology cannot be employed in lieu of constant controls for any purpose under the Act." See 1977 Clean Air Act Amendments for Stack Heights, Notice

of Proposed Rulemaking 44 FR 2608, January 12, 1979. It is USEPA's position that Congress, in the 1977 Amendments to the Act, permitted interim use of a SCS only as part of a Section 113(d) delayed compliance order or a primary nonferous smelter order under Section 119. Sections 113(d) and 119, 42 U.S.C. 7413(d), and 7419. American Lung in its comments agrees with USEPA's position.

3. Nonattainment Designation and Requirements of Part D of the Act

Dow maintains that the area in which its plant is located in Midland, Michigan, is an attainment area for NAAQS because of monitoring data recorded while Dow was using its SCS. USEPA has designated the area as a nonattainment area because Dow has failed to comply with its required emission limitations. Dow's reliance on SCS to avoid ambient standard violations is an impermissible way to attain national standards. See Sections 110(a)(2)(B), 123(a) and 302 (k) and (m).

American Lung's comments stressed disapproval of Dow's Order No. 01–1979 under Part D of the Act. USEPA agrees and has proposed disapproval of the Order for failure to meet Part D requirements in a Notice of Proposed Rulemaking published February 13, 1980 (45 FR 9752).

American Lung's comments, which pertain to the requirements of Part D, and other comments received in response to the proposed disapproval under Part D will be considered in USEPA's final rulemaking on that proposed disapproval.

4. Equitable Considerations

Dow stresses that USEPA's position is inequitable in that Dow is being penalized for its use of less than "Good Engineering Practice" stacks; that USEPA's disapproval will not result in any improvement in the public health and welfare in the public area; and that it would waste a critical national resource.

Dow's policy has been to rely on the possibility of purchasing process steam from a nuclear plant to be constructed by Consumers Power Company near Dow's Midland, Michigan industrial facilities. The nuclear facility was to have been operational by 1974–1975. When it became obvious that this operational date was not possible Dow sought to extend its compliance date for meeting the sulfur dioxide and particulate emission limits in the Michigan State Implementation Plan through Stipulation and Entry of Consent Orders with the MAPCC, which Consent Orders permitted Dow to attain and maintain NAAQS through the use of a SCS. These Consent Orders were not submitted to USEPA as SIP revisions. Dow has insisted on this approach even though it has been informed by both the MAPCC and USEPA that operation of a SCS in lieu of continuous emission controls was not an acceptable means of emission control.[7]

[7] 41 FR 7450, Stack Height Increase Guidelines issued February 18, 1976; Notice of Violation EPA–5–77–A–13 issued November 18, 1976 by James O. McDonald, Director of Enforcement, Region V, USEPA; Answer of MAPCC to Dow's Complaint filed in *Dow Chemical Co. v Reizen, et al.*, Michigan Court of Appeals No. 77–4792, United States District Court, Western District of Michigan, Southern Division (December, 1977), and USEPA correspondence with Dow in 1977.

In the July 21, 1977 Consent Order, Dow agreed to achieve compliance by July 1, 1980 with the State emission limits for particulate matter, opacity, and sulfur dioxide. Compliance was to have been achieved through the use of compliance fuels. In this Order Dow did not make any claim that it was economically infeasible to achieve compliance by switching to compliance fuels in 1980. Instead of taking steps which would enable Dow to achieve final compliance by switching to compliance fuels in 1980, the Company negotiated further Consent Orders, the last of which extended the compliance date to December 31, 1982. Instead of implementing its SCS, Dow could have chosen other means of compliance in the early 1970's when it became apparent that the start up of the nuclear plant was beyond Dow's control. Dow can still select other means of compliance which meet the requirements of the Clean Air Act, i.e., continuous emission reduction.

Dow claims that it is inequitable for USEPA to expect Dow to comply with the requirements of the Clean Air Act. The Act does not empower USEPA to consider equities in fulfilling its statutory mandate. The Act provides that USEPA is to approve a SIP revision if, among other things, it contains a demonstration that NAAQS, both primary and secondary, will be attained and maintained through emission limitations. Such a demonstration must be made by approved modeling or monitoring techniques which cannot be affected by any dispersion techniques as defined by Section 123 of the Act. The February 14, 1979, Consent Order submitted as a proposed SIP revision does not contain this demonstration. Because the proposed revision permits Dow to use a SCS to attain standards, rather than providing for immediate compliance with the emission limitations that Dow was required to meet in 1975, the revision does not satisfy the statutory requirements and cannot be approved by USEPA.

5. Health Effects From Use of Supplementary Control System as Compared to Continuous Emission Controls

Dow submitted various opinions from individuals concerning the health and welfare effects to be gained by requiring Dow to implement continuous emission controls as opposed to permitting Dow to continue to use its SCS to keep from violating the SO_2 NAAQS. DOW claims that "no significant health effects will be prevented by controlling DOW-Midland SO_2 emissions below the SCS level." Congress considered health and welfare effects in passing the Clean Air Act Amendments of 1970 and 1977. Congress determined that use of dispersion techniques may result in adverse health and welfare impacts hundreds of miles from a source and therefore required use of continuous emission reduction technology to attain the standards. See H.R. Rep. No. 95–294, 95th Cong. 1st. Sess. (1977) at 79–94. USEPA has no authority to override that congressional judgment.

The comments of American Lung Association of Michigan have been addressed in USEPA's response to Dow's comments with the exception of No. 4 which asserted that the proposed SIP revision does not provide for emission monitoring as required in Section 114(a) of the Act and in State regulations. Section 114(a)(1) of the Act provides the Administrator with discretionary authority to require a source to perform in-stack monitoring of emissions in order to assist in the determination of whether or not compliance is being achieved.

American Lung also cites Michigan rules which require in-stack monitoring as a condition for obtaining relief from sulfur emission limits beyond 1980. The discretionary authority found in Section 114(a)(1) is not applicable to this situation inasmuch as it does not establish criteria for SIP approval or disapproval. In addition, State requirements for extending compliance dates are a matter of State law and do not establish Federal requirements for the approval or disapproval of a SIP by USEPA.

USEPA has determined the proposed SIP revision, Consent Order No. 01–1979, dated February 13, 1979, lacks a demonstration that the primary and secondary National Ambient Air Quality Standards will be attained and maintained without use of a supplementary or intermittent control system, does not provide for continuous emission reduction, and does not contain emission limitations for sulfur dioxide and particulates.

Therefore, the revision is disapproved as not complying with the requirements of Sections 110(a)(2) and (3). (42 U.S.C. 7410(a)(2) and (3)).

Under Executive Order 12044 (43 FR 12661), USEPA is required to judge whether a regulation is "significant" and, therefore, subject to certain procedural requirements of the Order or whether it may follow other specialized development procedures. USEPA labels these other regulations as "specialized". I have reviewed this regulation and determined that it is a specialized regulation not subject to the procedural requirements of Executive Order 12044.

This Final Rulemaking is issued under the authority of Section 110 of the Clean Air Act as amended. (42 U.S.C. 7410, *et. seq.*)

Dated: March 18, 1980.

Douglas Costle,

Administrator.

[FR Doc. 80-8969 Filed 3-25-80; 8:45 am]

BILLING CODE 6560-01-M

APPENDIX "C"

ORDER CONSOLIDATING CASES

(United States Court of Appeals
For the Sixth Circuit)

(Filed Sept. 25, 1980)

(Dow Chemical v USEPA, Nos. 78-3139, 78-3595, 80-3260)

Before: EDWARDS, Chief Judge, PHILLIPS and PECK, Senior Circuit Judges.

On receipt and consideration of briefs and oral arguments in appeals in Nos. 78-3139 and 78-3595; and

On receipt and consideration of an appeal in No. 80-3260; and

Noting that both sets of appeals involve similar questions,

Now, therefore, all appeals numbered above are hereby consolidated and reset or set for oral argument in the October term.

Entered by order of the Court

/s/ John P. Hehman
Clerk

ORDER DENYING PETITIONS FOR REVIEW

(United States Court of Appeals
For the Sixth Circuit)

(Filed Dec. 9, 1980)

(Dow Chemical v USEPA; Nos. 78-3139; 78-3595; 80-3260)

Before: EDWARDS, Chief Judge, PHILLIPS and PECK, Senior Circuit Judges.

On petition to review final action of Administrator, U. S. Environmental Protection Agency,

These cases came on to be heard on the record of proceedings before the Environment Protection Agency and were argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the petitions for review are denied.

It is further ordered that Respondents recover from Petitioner the costs on appeal as itemized below.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

ORDER DENYING MOTION FOR REHEARING

(United States Court of Appeals
For the Sixth Circuit)

(Filed February 9, 1980)

(Dow Chemical v USEPA; Nos. 78-3139, 78-3595, 80-3260)

Before: EDWARDS, Chief Judge, PHILLIPS and PECK, Senior Circuit Judges.

On receipt and consideration of a motion for rehearing,

The same is hereby denied, since all of the matters presented in said motion were thoroughly considered by the panel in advance of issuance of its opinion.

Entered by order of the court

/s/ John P. Hehman
Clerk

APPENDIX "D"

EXCERPTS OF THE CLEAN AIR ACT

§ 7407. Air quality control regions

List of noncomplying regions

(d)(1) For the purpose of transportation control planning, part D of this subchapter (relating to nonattainment), part C of this subchapter (relating to prevention of significant deterioration of air quality), and for other purposes, each State, within one hundred and

twenty days after August 7, 1977, shall submit to the Administrator a list, together with a summary of the available information, identifying those air quality control regions, or portions thereof, established pursuant to this section in such State which on August 7, 1977 —

(A) do not meet a national primary ambient air quality standard for any air pollutant other than sulfur dioxide or particulate matter;

(B) do not meet, or in the judgment of the State may not in the time period required by an applicable implementation plan attain or maintain, any national primary ambient air quality standard for sulfur dioxide or particulate matter;

(C) do not meet a national secondary ambient air quality standard;

(D) cannot be classified under subparagraph (B) or (C) of this paragraph on the basis of available information, for ambient air quality levels for sulfur oxides or particulate matter; or

(E) have ambient air quality levels better than any national primary or secondary air quality standard other than for sulfur dioxide or particulate matter, or for which there is not sufficient data to be classified under subparagraph (A) or (C) of this paragraph.

(2) Not later than sixty days after submittal of the list under paragraph (1) of this subsection the Administrator shall promulgate each such list with such modifications as he deems necessary. Whenever the Administrator proposes to modify a list submitted by a State, he shall

notify the State and request all available data relating to such region or portion, and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate.

§ 7410. State implementation plans for national primary and secondary ambient air quality standards

Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under

paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that —

(A) except as may be provided in subparagraph (1)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D);

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a program to provide for the enforcement of emission limitations and regulation of the modification, construction, and operation of any stationary source, including a permit program as required in parts C and D of this subchapter and a permit or equivalent program for any major emitting facility, within such region as necessary to assure (i) that national ambient air quality standards are achieved and maintained, and (ii) a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirements of section 7426 of this title, relating to interstate pollution abatement;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan; (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources; (iii) for periodic reports on the nature and

amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; (v) for authority comparable to that in section 7603 of this title, and adequate contingency plans to implement such authority; and (vi) requirements that the State comply with the requirements respecting State boards under section 7428 of this title;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards;

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements or to otherwise comply with any additional requirements established under the Clean Air Act Amendments of 1977;

(I) it provides that after June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as defined in section 7501(2) of this title) to which such plan

applies, if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction or modification, such plan meets the requirements of part D of this subchapter (relating to nonattainment areas);

(J) it meets the requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection); and

(K) it requires the owner or operator of each major stationary source to pay to the permitting authority as a condition of any permit required under this chapter a fee sufficient to cover —

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, whether before or after August 7, 1977, the reasonable costs (incurred after August 7, 1977) of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action).

(3)(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the

requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

§ 7423. Stack heights

Heights in excess of good engineering practice; other dispersion techniques

(a) The degree of emission limitation required for control of any air pollutant under an applicable implementation plan under this subchapter shall not be affected in any manner by —

(1) so much of the stack height of any source as exceeds good engineering practice (as determined under regulations promulgated by the Administrator), or

(2) any other dispersion technique.

The preceding sentence shall not apply with respect to stack heights in existence before December 31, 1970, or dispersion techniques implemented before such date. In establishing an emission limitation for coal-fired steam electric generating units which are subject to the provisions of section 7418 of this title and which commenced operation before July 1, 1957, the effect of the entire stack height of stacks for which a construction contract was awarded before February 8, 1974, may be taken into account.

Dispersion technique

(b) For the purpose of this section, the term "dispersion technique" includes any intermittent or supplemental control of air pollutants varying with atmospheric conditions.

§ 7501. Definitions

For the purpose of this part and section 7410(a)(2)(I) of this title —

(2) The term "nonattainment area" means, for any air pollutant an area which is shown by monitored data or which is calculated by air quality modeling (or other methods determined by the Administrator to be reliable) to exceed any national ambient air quality standard for such pollutant. Such term includes any area identified under subparagraphs (A) through (C) of section 7407(d)(1) of this title.

§ 7602. Definitions

When used in this chapter —

(k) The terms "emission limitation" and "emission standard" mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.

(m) The term "means of emission limitation" means a system of continuous emission reduction (including the use of specific technology or fuels with specified pollution characteristics).

§ 7607. Administrative proceedings and judicial review

Judicial review

(b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under

section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title) any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412(c) of this title, under section 7413(d) of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 119 (c)(2)(A), (B), or (C) (as in effect before August 7, 1977) or under regulations thereunder, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

APPENDIX "E"

STIPULATION FOR ENTRY OF CONSENT ORDER AND FINAL ORDER

(State of Michigan
Department of Natural Resources
Air Pollution Control Commission)

In re Administrative Proceedings against DOW CHEMICAL COMPANY, a Delaware Corporation, concerning sulfur dioxide emissions from fossil fuel burning operations at Midland Division, in Midland, Michigan. File No. 12-73-05

This matter is before the Air Pollution Control Commission on a proposal from the company to implement a Supplementary Control System for sulfur dioxide control in lieu of the Company's commitment to construct two 400-foot stacks to enhance dispersion of sulfur dioxide. The previous commitment was developed because the Commission had cause to believe that the fossil fuel fired boilers are emitting sulfur dioxide that, if continued unabated, will be in excess of allowable limits according to the provisions of Michigan R. 336.49 (ACS No. 71, pages 30-32) on July 1, 1975. Supplementary Control Systems are systems which limit the rate of pollutant emissions during periods when meteorological conditions conducive to ground level concentrations in excess of air quality standards are anticipated.

Dow Chemical Company and the staff hereby, with the approval of this Commission, agree to the termination of this proceeding by entry of a Final Order by consent.

Dow Chemical Company and staff hereby and herewith stipulate and agree as follows:

1. That Dow Chemical Company, a Delaware Corporation, having its principal office at Midland, Michigan, acknowledges proper service of a notice of hearing and proposed order for corrective action, and expressly herewith waives the filing of an answer or denial thereto.

2. That the Dow Chemical Company acknowledges that it is presently the source of the emissions which result in all significant ambient air concentrations of sulfur dioxide in and around Midland, Michigan.

3. That the Dow Chemical Company has demonstrated to the satisfaction of the Commission that all constant emission reduction technology reasonably available to the company has been applied and is presently insufficient to attain the national sulfur dioxide air quality standards. The company and the staff agree that further constant emission reduction means, other than tall stack construction, are not reasonably available to the company at this time.

4. That the Dow Chemical Company has demonstrated the technical feasibility of its version of a Supplementary Control System to achieve the primary and secondary sulfur dioxide air quality standards by July 1, 1975.

5. That Dow Chemical Company and the staff agree that the signing of this Stipulation is for settlement purposes only and does not constitute an admission by Dow Chemical Company that the law has been violated, but both staff and Dow Chemical Company do expressly agree that the sulfur dioxide emissions from Midland Division, South Side and West Side Power Plants, at

Midland, Michigan, should be abated and, therefore, both staff and Dow Chemical Company herewith and hereby stipulate and agree to the following time schedule for affirmative action:

a) By April 1, 1974, Dow Chemical Company shall replace the four existing continuous sulfur dioxide analyzers with units that will comply with the United States Environmental Protection Agency's specifications as listed in the Federal Register, Volume 36, No. 84, April 30, 1971.

b) Furthermore, Dow Chemical Company shall install up to four additional sulfur dioxide monitors at locations and on a timetable specified by the Chief, Air Pollution Control Division, Department of Natural Resources.

c) On and after May 1, 1974, Dow Chemical Company shall submit to the staff on a real time basis all air quality data from the sulfur dioxide monitoring stations and other pertinent information related to fuel switching and the implementation of the Supplementary Control System at Midland, Michigan. Dow Chemical Company shall provide at its expense the necessary equipment to receive this information at the staff offices in Lansing.

d) By April 1, 1974, and monthly thereafter, Dow Chemical Company shall submit a monthly report of air quality data summaries and a summary of abatement action taken at the South Side and West Side Power Plants.

e) By September 1, 1974, submit to the Commission evidence to show cause, if any Dow Chemical Company has, why the company

should not be required to increase the stack height for Boiler No. 20.

f) After June 30, 1975 Dow Chemical Company shall prevent all sulfur dioxide air quality standards promulgated by the United States Environmental Protection Agency in Federal Register, Volume 36, No. 84, dated April 30, 1971, from being exceeded in and around Midland, Michigan, for any cause attributable to the company. The company shall utilize at its option lower sulfur fuel, load reduction, plant shut down or other means to accomplish this objective.

g) By January 1, 1975, and annually thereafter, the company shall report to the Commission and shall show cause, if any the company has, as to why the company should not proceed with dispatch to the design and installation of particulate controls on its existing coal-fired boilers.

h) By July 1, 1980, Dow Chemical Company shall purchase its steam and power requirements in sufficient quanitities or make other operating modifications, as appropriate, to be approved in advance by the Commission, to ensure complete compliance with all applicable state and federal particulate and sulfur dioxide emission limitations, such limitations being published in the Administrative Code.

6. The Dow Chemical Company and the staff agree that this stipulation and final order rescinds an agreement between the parties dated March 14, 1973, entitled Voluntary Agreement for Air Pollution Abatement.

Staff and Dow Chemical Company both acknowledge that public hearings on this abatement program were held before the Commission on December 18, 1973. Both staff and Dow Chemical Company hereby consent to enforcement of this stipulation and Final Order in the same manner and by the same procedures for all final orders entered pursuant to Section 16 of Act 257 of the Public Acts of 1972, being Section 336.26 of the Michigan Compiled Laws, including, but not limited to, enforcement by legal action brought under 1972 PA 257 and/or 1970 PA 127.

Approved as to Form and Content
/s/ J. M. Leathers,
Vice President
Midland Division
Dow Chemical Company

Dated: 5/3/74

Approved as to Content:
/s/ Lee E. Jager, Chief
Air Pollution Control Division
Dated: 5/7/74

Approved as to Form:
/s/ Stewart H. Freeman
Assistant Attorney General
Department of Natural Resources

Dated: May 13, 1974

FINAL ORDER

This Commission having read the above stated Stipulation for Entry of Consent Order, and the Commission being further fully advised in the premises.

IT IS ORDERED that this Consent Order shall be entered in the record of this Commission as stated herein.

AIR POLLUTION CONTROL COMMISSION
By: /s/ Ralph W. Purdy
Executive Secretary

Dated: 5/17/74

June 13, 1974

Mr. Francis T. Mayo
Regional Administrator
U.S. Environmental Protection Agency
1 North Wacker Drive
Chicago, Illinois 60606

Dear Mr. Mayo:

The purpose of this letter is to transmit to EPA compliance schedules which have recently been finalized between sources of air pollution in the State of Michigan and the Michigan Air Pollution Control Commission.

Following is a list of the compliance schedules enclosed with this letter:

Performance Contract for Air Pollution Abatement

04-1974 — Bridgman Casting Center, Division of Marmon Group, Inc.
05-1974 — Consumers Power Company, J. R. Whiting Plant
06-1974 — Union Camp Corporation

Stipulation for Entry of Consent Order and Final Order

12-73-05 — Dow Chemical Company
06-1974 — Berlin and Farro Liquid Incineration, Inc.
07-1974 — Dundee Cement Company

Final Order for Corrective Action

04-1974 — Battle Creek Foundry Company

Amendments – Performance Contracts

973-13 — Consumers Power Company, J. R. Whiting Plant
973-12 — Consumers Power Company, D. E. Karn Plant

We look forward to approval by the EPA of these compliance schedules and would be pleased to meet with your staff members to discuss them in more detail if such a conference would assist in your review.

Very truly yours,

Lee E. Jager, Chief
Air Pollution Control Division

LEJ:mah
Enclosures (9)

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION V
230 SOUTH DEARBORN ST.
CHICAGO, ILLINOIS 60604

Mr. Lee E. Jager, Chief
Air Pollution Control Division
Department of Natural Resources
Stevens T. Mason Building
Lansing, Michigan 48926

July 10, 1974

Dear Mr. Jager:

Thank you for your letter of June 13, 1974 in which you submitted the following compliance schedules:

Performance Contract for Air Pollution Abatement

04-1974 — Bridgman Casting Center, Division of Marmon Group, Inc.
05-1974 — Consumers Power Company, J. R. Whiting Plant
06-1974 — Union Camp Corporation

Stipulation for Entry of Consent Order and Final Order

12-73-05 — Dow Chemical Company
06-1974 — Berlin and Farro Liquid Incineration, Inc.
07-1974 — Dundee Cement Company

Final Order for Corrective Action

04-1974 — Battle Creek Foundry Company

Amendments – Performance Contracts

973-13 — Consumers Power Company, J. R. Whiting Plant
973-12 — Consumers Power Company, D. E. Karn Plant

We are presently reviewing the schedules and will contact you if further assistance is necessary.

Very truly yours,

/s/ Dale S. Bryson, Acting Director
Enforcement Division

STIPULATION FOR ENTRY OF CONSENT ORDER AND FINAL ORDER

(State of Michigan
Department of Natural Resources
Air Pollution Control Commission)

In the matter of administrative proceedings against THE DOW CHEMICAL COMPANY, a Delaware corporation, concerning particulate matter and sulfur dioxide emission from fossil fuel burning operations at the Michigan Division in the City of Midland, County of Midland, State of Michigan. APC No. 10-1977

This proceeding arises out of Final Order 12-73-05, an Order for Rehearing dated January 21, 1976 of the Michigan Air Pollution Control Commission [hereinafter referred to as the "Commission"] and a proposal from The Dow Chemical Company [hereinafter referred to as "Dow"] for the continued operation of its South Side and West Side Power Plants at Dow's manufacturing location in Midland, Michigan, after July 1, 1980.

One of the provisions of the existing Consent Order, No. 12-73-05, is that the Company shall purchase its steam and power requirements after July 1, 1980 or make other operating modifications, as appropriate, to be approved in advance by the Commission, to insure complete compliance with all applicable State particulate and sulfur dioxide emission limitations. Because it is now apparent that Dow will not be able to purchase its steam by this date, Dow has proposed to comply with all applicable State emission limitations and regulations by eliminating coal as a fuel in its Power Plants.

This Consent Order has been developed in order to incorporate provisions caused by the proposed complete conversion from coal to oil as a fuel. This Consent Order has also been developed because particulate matter and sulfur dioxide emissions from the Power Plants, if not abated, would be in excess of allowable limits according to the provisions of Michigan R 336.41, R 336.44 and R 336.49, Administrative Code, 1973 AACS.

Dow and the staff of the Air Quality Division, Department of Natural Resources [hereinafter referred to as the "Staff"] with the approval of the Commission, agree to the termination of this proceeding by entry of a final order of consent in accord with the stipulation recited below.

Dow and Staff hereby and herewith stipulate and agree as follows:

1. Dow acknowledges proper service of a notice of hearing and proposed order and expressly waives filing of an answer. Dow agrees to the termination of this matter by the entry of a final consent order incorporating the terms of this Stipulation in the form attached to this Stipulation.

2. Dow acknowledges that it is presently the source of the emissions which results [sic] in all significant ambient air concentrations of sulfur dioxide in and around Midland, Michigan.

3. Dow has demonstrated to the satisfaction of the Commission that all constant emission reduction technology reasonably available to Dow and economically feasible to install between now and July 1, 1980 has been applied and such constant emission reduction technology is insufficient to attain the Federal primary and secondary ambient air quality standards. Following July 1, 1980, the only constant emission reduction technology reasonably available to Dow and economically feasible to install is fuel conversion. However, Dow has demonstrated the technical and operational feasibility of its version of a Supplementary Control System to achieve the Federal primary and secondary ambient air quality standards.

4. Dow and the staff agree that the signing of this Stipulation is for settlement purposes only and does not constitute an admission by Dow that the law has been violated. However, both Staff and Dow do expressly agree that the particulate and sulfur dioxide emissions from Dow's South and West Side Power Plants in Midland, Michigan, should be abated; and, therefore,

both Staff and Dow herewith and hereby stipulate and agree to the following time schedule and program for further affirmative action:

(a) CONTROL PROGRAM:

(i) By July 1, 1980, Dow shall utilize fuel which when burned will result in compliance with the State emission standards, R 336.41, R 336.44 and R 336.49, unless otherwise permitted by the Commission.

(ii) In order to meet the July 1, 1980 date above, Dow shall meet the increments of progress noted in Attachment A. Deviation from Attachment A shall be permitted only to the extent that it does not interfere with meeting the July 1, 1980 date and if Dow notifies the Staff in writing prior to such deviations.

(b) SUPPLEMENTARY CONTROL SYSTEM: Supplementary Control Systems (SCS) are systems which limit the rate of pollutant emissions during periods when meteorological conditions conducive to ground level concentrations in excess of Federal ambient air quality standards are anticipated. In order to maintain ambient air quality, Dow and Staff hereby and herewith agree to be bound by the following operational details of a Supplementary Control System (SCS):

(i) On and after the effective date of this Order, Dow shall maintain the operation of eight (8) continuous sulfur dioxide monitors of a type and at locations approved by the Staff. The operation of these monitors shall

continue until the Power Plants are in compliance with all applicable State sulfur dioxide emission limits and Dow has demonstrated to the satisfaction of the Commission that the potential for violations of the Federal ambient air quality standards has been eliminated.

(ii) On and after the effective date of this Order, Dow shall submit to Staff the information referred to in Attachment B. Attachment B may only be changed upon mutual agreement of Staff and Dow or upon order of the Commission. All monitoring, meteorological and boiler operating data mentioned in Attachment B shall continue to be submitted until the Power Plants are in compliance with all applicable State sulfur dioxide emission limits and Dow has demonstrated to the satisfaction of the Commission that the potential for violations of the Federal ambient air quality standards have been eliminated. Dow retains full responsibility for the operation of its Power Plants. The information released to the Staff according to Attachment B shall be used by the Staff to evaluate Dow's operation of the SCS.

(iii) After the effective date of this Order and until the program mentioned in paragraph 4(a), above, becomes fully operational, Dow shall prevent ambient sulfur dioxide concentrations in and around Midland, Michigan, from ever exceeding a running 24-hour average of 0.14 ppm, an

annual arithmetic mean of 0.03 ppm, or a running 3-hour average of 0.50 ppm. Dow shall utilize low sulfur fuel, load reduction, plant shutdown, or other means to maintain this air quality. Each excursion above the specified limit at the same monitor or at different monitors shall constitute a separate violation of this Order. Both Staff and Dow acknowledge that the requirements set forth in this paragraph are more stringent than would be required to satisfy the Federal ambient air quality standards.

(iv) Dow shall retain the services of a consultant(s) for air quality modeling and meteorological forecasting purposes (or otherwise provide such services) approved by the Chief, Air Quality Division. Any change in any consultant requires written authorization by the Chief, Air Quality Division, following a demonstration by Dow that the necessary services can be satisfactorily performed by another party.

(v) Dow shall provide the consultant(s) mentioned in paragraph 4(b)(iv), above, with a separate series of control strategies for each of the West Side and South Side Power Plants. Those strategies shall be based upon the combinations of boilers which may be available for operations at any time in the future. Each strategy shall itemize consecutive steps that specify changing modes of boiler operations such that the power plant's sulfur dioxide emissions can be incrementally reduced. The consultant(s) shall regularly

recommend to Dow a strategy step which the consultant(s) has determined will assure at all times the maintenance of air quality as described in paragraph 4(b)(iii), above.

(vi) After the effective date of this Order, and until the air pollution control program mentioned in paragraph 4(a), above, becomes fully operational, Dow shall operate its boilers in accordance with a strategy step which will result in sulfur dioxide ground level concentrations at least as low as the ground level concentrations would be if the strategy step specified by the consultant mentioned in paragraph 4(b)(v), above, were followed.

(c) REPORTING: Annually from the date of final adoption of this Consent Order, Dow shall submit to Staff (and upon request to the Commission) a report of its progress towards complying with the provisions of this Control Program and Supplementary Control System (including Attachments A and B). Any significant developments which would preclude compliance by Dow with any provision of this Consent Order shall be immediately transmitted in writing to the Staff and the Commission.

5. Dow and the Staff agree that this Stipulation and Final Order, upon approval by the Commission, rescinds an agreement between the parties dated May 17, 1974, Final Order No. 12-73-05.

6. Staff and Dow both acknowledge that a public hearing on this abatement program was held on May 11, 1977. Both Staff and Dow hereby consent to enforcement of this Stipulation and Final Order in the same manner

and by the same procedures for all final orders entered pursuant to Section 16 of Act 257 of the Public Acts of 1972, being Section 336.26 of the Michigan Compiled Laws, including but not limited to, enforcement by legal action brought under 1972 PA 257 and/or 1970 PA 127.

Approved as to Form and Content:
Paul Oreffice
THE DOW CHEMICAL COMPANY
Dated: 6/21/77

Approved as to Content:

/s/ Lee E. Jager, Chief
Air Quality Division
Department of
Natural Resources

Dated: July 21, 1977

Approved as to Form:

Stewart H. Freeman
Assistant Attorney General
Department of
Attorney General

Dated: July 18, 1977

FINAL ORDER

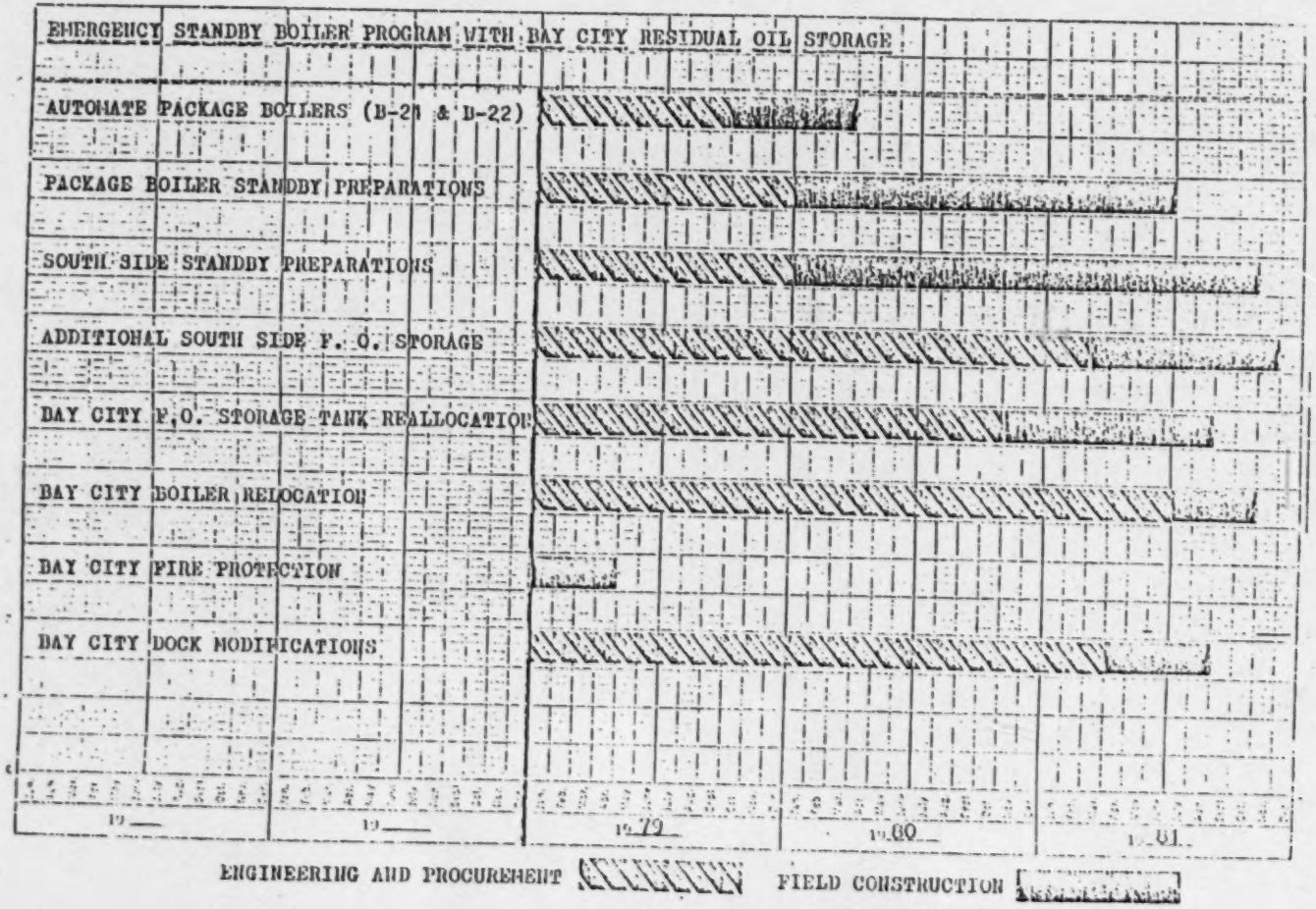
This Commission having had opportunity to review the above-stated Stipulation for Entry of Consent Order, and having approved the terms thereof, and this Commission having authorized the Executive Secretary of the Air Pollution Control Commission as agent of the Commission to enter into Consent Orders,

IT IS ORDERED that the Stipulation for Entry of Consent Order is approved and shall be entered in the record of this Commission as stated herein.

AIR POLLUTION CONTROL
COMMISSION

/s/ Lee E. Jager
Executive Secretary

Dated: July 21, 1977


EMERGENCY STANDBY BOILER PROGRAM WITH BAY CITY RESIDUAL OIL STORAGE
AUTOMATE PACKAGE BOILERS (B-21 & B-22)
PACKAGE BOILER STANDBY PREPARATIONS
SOUTH SIDE STANDBY PREPARATIONS
ADDITIONAL SOUTH SIDE F. O. STORAGE
BAY CITY F.O. STORAGE TANK REALLOCATION
BAY CITY BOILER RELOCATION
BAY CITY FIRE PROTECTION
BAY CITY DOCK MODIFICATIONS
19__
19__
19 79
19 80
19 81
ENGINEERING AND PROCUREMENT
FIELD CONSTRUCTION

REH 12/15/78

ATTACHMENT B

1) EVERY EIGHT (8) HOURS:

(i) Twenty-four (24) hour meteorological forecasts that the consultant(s) use in the dispersion model(s), including wind direction, wind speed, stability and mixing heights.

(ii) Recommended control strategy steps for subsequent 24 hours.

(iii) Predicted 3-hour and 24-hour running averages of sulfur dioxide concentrations for each of the subsequent 12 hours at each monitoring station and the maximum predicted 3-hour and 24-hour running averages of sulfur dioxide concentrations and their location. It is understood that the predictions for the maximum concentrations shall also be for each of the subsequent 12 hours.

2) DAILY:

(i) Summary of sulfur dioxide air quality data for previous day, including hourly averages and running 24-hour averages.

(ii) Boiler operation summary specifying actual operation. When strategy step calls for reduced operation from any boiler, the boiler operation summary shall include the boiler load reported as a percentage of full or nominal load.

(iii) Measured meteorological data, including wind speed, wind direction (including deviation), temperature, dew point temperature, and low

level (10-91 meters) lapse rate as observed in Midland. Such data shall be submitted in an hourly format for the preceding 24 hours and shall include 10, 60 and 90 meter observations.

3) MONTHLY:

(i) Sulfur dioxide air quality data from all stations in SAROAD format.

4) AS REQUESTED:

(i) All amendments to control strategies, including supplementary steps not normally defined by the consultant(s) and amended meteorological forecasts, appropriate steps as they occur, and other information requested by staff relating to the operation of the SCS.

(ii) A report of all occurrences when the actual boiler operation did not follow the recommended strategy, including a demonstration as to whether or not the actual operation was equivalent to the recommended strategy with respect to its air quality impact.

July 21, 1977

Mr. George R. Alexander, Jr.
Regional Administrator
U.S. Environmental Protection Agency
230 South Dearborn Street
Chicago, Illinois 60604

Dear Mr. Alexander:

The purpose of this letter is to transmit to EPA a compliance schedule which has recently been finalized between The Dow Chemical Company and the Michigan Air Pollution Control Commission.

Stipulation for Entry of Consent Order and Final Order, APC No. 10-1977, is enclosed. We look forward to approval by the EPA of this compliance schedule and would be pleased to meet with your staff members to discuss it in more detail if such a conference would assist in your review.

Very truly yours,

/s/ Lee E. Jager, Chief
Air Quality Division

LEJ:mah
Enclosure

cc: Hunter W. Henry, Jr.
The Dow Chemical Company

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION V
230 SOUTH DEARBORN ST.
CHICAGO, ILLINOIS 60604

Mr. Lee E. Jager, Chief
Division of Air Pollution Control
Michigan Department of Natural
Resources
Stevens T. Mason Building
Lansing, Michigan 48926

August 10, 1979

RE: Dow Chemical Company
Department of Natural Resources
Consent Order APC No. 10-1977

Dear Mr. Jager:

Thank you for the transmittal of the July 21, 1977, Consent Order APC No. 10-1977. The United States Environmental Protection Aency (U.S. EPA) policy regarding State compliance schedules which provide for final compliance with emission limitations at some date beyond an applicable attainment date, is that such schedules must conform to the requirements of the Clean Air Act and 40 CFR Part 51 and be accompanied by a control strategy demonstration. If such document demonstrates that the compliance schedule will not interfere with the attainment or maintenance of national ambient air quality standards, the schedule will be approved as a revision to the State Implementation Plan, see 41 FR 18510 (May 15, 1976), *Train* v. *NRDC et al*, 421 U.S. 60 (1975). The typical strategy demonstration contains the latest available comprehensive data regarding air quality, emissions and background levels which influence that air quality, the regulations which

control the emissions, and the procedures which ensure that the national standards will be maintained in the future.

Please note that the Michigan Implementation Plan currently sets out a compliance schedule specifically for Dow Chemical Company at 40 CFR Section 52.1175(e), which requires final compliance with emission limitations by April 1, 1975. If the State of Michigan wishes to grant Dow Chemical Company a Consent Order which delays compliance beyond this final date, then a control strategy demonstration must be submitted. Until such time as the New Consent Order is approved by U.S. EPA as a revision to the State Implementation Plan, the source is subject to Federal enforcement action and citizen suit under the current Implementation Plan.

Due to the utilization by the subject source of a supplemental control system, it should be specifically noted that, in order to obtain U.S. EPA approval, any Consent Order must conform to the U.S. EPA Tall Stack-Supplemental Control System Policy set out at 41 FR 7450 (February 18, 1976) and the Sixth Circuit's decision in *Big Rivers, et al* v. *EPA*, 523 F. 2d 16 (CA6, 1975).

This office has received a copy of a letter from Mr. Robert I, Hanfling, Deputy Assistant Administrator of the Federal Energy Administration to Mr. Zoltan Merszei, President of the Dow Chemical Company, expressing concern that the proposed conversion of coal fired boilers to oil utilization is contrary to National energy policy. Has this recommendation of the Federal Energy Administration that "all potential alternatives" to conversion be considered affected the conversion compliance strategy set out in your Consent Order?

Consistent with the above, will you please supply this office with a control strategy demonstration for Michigan Consent Order APC No. 10-1977 in order that an Implementation Plan revision analysis can be performed. If you have any questions or desire additional information, please contact Mr. Michael Smith of my staff at (312) 353-2086.

Sincerely yours,

/s/ George R. Alexander, Jr.
Regional Administrator

STATE OF MICHIGAN
WILLIAM G. MILLIKEN, Governor

DEPARTMENT OF NATURAL RESOURCES
STEVENS T. MASON BUILDING, BOX 30028
LANSING, MICHIGAN 48909

August 22, 1977

Mr. George R. Alexander, Jr.
Regional Administrator
U.S. Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois 60604

Dear Mr. Alexander:

This is in reply to your letter dated August 10, 1977 and received in this office on August 17, 1977 concerning Consent Order, APC No. 10-1977, issued by the Michigan Air Pollution Control Commission to the Dow Chemical Company of Midland, Michigan. In your letter you state that this compliance program as contained in

that Consent Order can only be approved as an amendment to the Michigan State Implementation Plan and, therefore, the compliance schedule must be accompanied by a "control strategy demonstration."

Quoting further from your letter, "The typical strategy demonstration contains the latest available comprehensive data regarding air quality, emissions and background levels which influence that air quality, the regulations which control the emissions, and the procedures which ensure that the national standards will be maintained in the future." It appears to me that the regional EPA office has all of the information that is being requested, specifically the regional office receives regular reports from our air quality monitoring network and should by this time be in receipt of our most recent published Air Quality Data Report covering 1976 data. Additionally, EPA regularly receives emissions data from all sources in the State of Michigan, including the Dow Chemical Company. EPA is, of course, aware of our regulations and procedures which ensure that national standards will be maintained in the future, since these are the same regulations and procedures that were accepted by the EPA in their approval of the Michigan State Implementation Plan.

This office is willing to prepare a reasonable package of information pertaining to the specific situation in Midland; however, it is not clear to us from your letter how extensive this package should be and what the format of such a submittal should be. Your letter refers to a "typical strategy demonstration" and it would be greatly appreciated if you could send to this office an example of a typical strategy demonstration so that we may have some guidance in the preparation of our submittal.

In your letter you note that the Supplementary Control System must be consistent with U.S. EPA tall stack policy. To the best of our knowledge, the SCS program being implemented by Dow Chemical Company is totally consistent with that policy and is an interim program to protect air quality prior to full compliance with emission standards, which according to the Consent Order will occur in 1980.

Your letter also notes that the Federal Energy Administration has raised question as to whether the proposed conversion of these coal-fired boilers to oil utilization is contrary to the national energy policy. The use of additional oil in lieu of coal at the Dow Chemical Company and the consistency of that action with the national energy policy has been discussed between the Commission and the Company. The Company legal representatives have assured the Commission that there are no legal barriers to this increased use of oil in their boilers. If EPA differs with that legal position, this agency would greatly appreciate receiving those legal arguments. If the Company is not legally entitled to use oil as will be required under this Consent Order, of course, we will immediately renegotiate the terms of the Consent Order with the Company.

Very truly yours,

/s/ Lee E. Jager, Chief
Air Quality Division

LEJ:mah

cc: Mr. Hunter Henry
The Dow Chemical Company

STIPULATION FOR ENTRY OF CONSENT ORDER AND FINAL ORDER

(State of Michigan
Department of Natural Resources
Air Pollution Control Commission)

In the matter of administrative proceedings involving the DOW CHEMICAL COMPANY, a Delaware corporation, concerning sulfur dioxide, particulate matter and visual emissions from fossil fuel burning operations at the Michigan Division in the City of Midland, County Of Midland, State of Michigan. APC No. 01-1979

This proceeding arises out of Consent Order No. 10-1977 entered into between the Michigan Air Pollution Control Commission (hereinafter "Commission") and the Michigan Division of the Dow Chemical Company (hereinafter "Dow") on July 21, 1977. Under Consent Order No. 10-1977, Dow is authorized to exceed State emission limits for particulate matter, opacity, and sulfur dioxide and to operate a Supplementary (or Intermittent) Control System (hereinafter "SCS") until July 1, 1980. Consent Order No. 10-1977 also requires that: "By July 1, 1980, Dow shall utilize fuel which when burned will result in compliance with the State emission standards, R 336.41, R 336.44, and R 336.49, unless otherwise permitted by the Commission."

This Consent Order has been developed because the Commission, based upon information included in Dow's document entitled "Request for Extension of Sulfur Dioxide Compliance Date for Dow's Midland Powerhouses" and the evidence contained in the public record, believes that an extension of Dow's existing

variance from the State emission limits relating to sulfur dioxide, particulate matter, and visual emissions until December 1982 is warranted.

Dow and the Commission agree to the termination of this proceeding by entry of a new Consent Order in accord with the stipulation recited below.

Dow and the Commission herewith stipulate and agree as follows:

1. Dow acknowledges proper service of a notice of hearing and proposed order and expressly waives filing of an answer. Dow and the Commission agree to the termination of this matter by the entry of a final consent order incorporating the terms of this Stipulation in the form attached to this Stipulation.

2. Dow stipulates that termination of this matter by a Final Order to be entered as a Consent Order is proper and acceptable.

3. Dow acknowledges that it is presently the source of the emissions which result in all significant ambient air concentrations of sulfur dioxide in and around Midland, Michigan.

4. Dow has demonstrated to the satisfaction of the Commission that is not technologically reasonable or economically feasible to provide constant emission reductions between the present date and July 1, 1980. In view of Dow's contractural commitment, entered into with Consumers Power Company in December 1967, to purchase its process steam and electricity from Consumers Power Company when the nuclear power plant presently being constructed at Midland, Michigan, is completed and placed in operation, the Commission finds that burning oil and gas as principal fuels, commencing July 1, 1980, for a period of two and

one-half years, is not presently an economically feasible constant control.

5. Dow and the Commission agree that Federal Ambient Air Quality Standards for sulfur dioxide are presently being met in and around Midland, Michigan, because of the operation of an SCS by Dow.

6. Dow has demonstrated to the satisfaction of the Commission that the continued operation of its SCS, as hereinafter modified, with continued use of coal as a principal fuel will assure that the Federal Primary and Secondary Ambient Air Quality Standards for sulfur dioxide and the Federal Primary Ambient Air Quality Standard for particulate matter will be adhered to and not exceeded during the period covered by this Consent Order.

7. Dow and the Commission agree that the signing of this Stipulation is for settlement purposes only and does not constitute an admission by Dow that any law has been violated. However, both the Commission and Dow do expressly agree that sulfur dioxide and particulate emissions from Dow's South and West Side power plants in Midland, Michigan, should be reduced, and therefore both the Commission and Dow agree to the following time schedule for further affirmative action:

FINAL CONSTANT CONTROL PROGRAM

8. By December 31, 1982, and thereafter Dow shall purchase process steam and electricity or utilize fuel which when burned will result in continuous compliance with the State emission standards, R 336.41, R 336.44, and R 336.49.

9. In order to utilize the fuel required by Paragraph 8, above, by December 31, 1982, Dow shall meet the

increments of progress noted in Attachment A. Deviations of more than thirty (30) days from Attachment A shall be permitted only to the extent that it does not interfere with meeting the December 31, 1982, date and if Dow notifies the Staff in writing and receives written authorization from Staff prior to such deviations.

INTERIM CONTROL PROGRAM USING SUPPLEMENTARY OR INTERMITTENT CONTROL SYSTEMS

10. The parties agree to the continued operation of Dow's SCS until December 31, 1982, in accordance with the method of operation described below. Supplementary (or Intermittent) Control Systems (SCS) are systems which limit the rate of pollutant emissions during periods when meteorological conditions conducive to ambient ground level concentrations in excess of levels specified in subparagraph (iii) are anticipated. In order to maintain air quality, Dow and the Commission hereby and herewith agree to be bound by the following operational details of a supplementary control system.

(i) On and after the effective date of this Order, Dow shall maintain the operation of eight (8) continuous sulfur dioxide monitors of a type and at locations approved by the Staff. The operation of these monitors shall continue until the Power Plants are in compliance with all applicable State sulfur dioxide emission limits and Dow has demonstrated to the satisfaction of the Commission that the potential for violations of the Federal Ambient Air Quality Standards has been eliminated.

(ii) On and after the effective date of this Order, Dow shall submit to Staff the information referred to in Attachment B. Attachment B may only be changed upon mutual agreement of Staff and Dow or upon order of the Commission. All monitoring, meteorological and boiler operating data mentioned in Attachment B shall continue to be submitted until the Power Plants are in compliance with all applicable State sulfur dioxide emission limits and Dow has demonstrated to the satisfaction of the Commission that the potential for violations of the Federal Ambient Air Quality Standards have been eliminated. Dow retains full responsibility for the operation of its Power Plants. The information released to the Staff according to Attachment B shall be used by the Staff to evaluate Dow's operation of the SCS.

(iii) After the effective date of this Order and until the program required in paragraph 8 becomes fully operational, Dow shall prevent ambient sulfur dioxide concentrations in and around Midland, Michigan, from ever exceeding a running 24-hour average of 0.14 ppm, an annual arithmetic mean of 0.03 ppm, or a running 3-hour average of 0.50 ppm. Dow shall utilize low sulfur fuel, load reduction, plant shut down, or other means to maintain this air quality. Each excursion above the specified limit at the same monitor or at different monitors shall constitute a separate violation of this Order. Both Staff and Dow acknowledge that the requirements set forth in this paragraph are more stringent than would be required to satisfy the Federal sulfur dioxide Ambient Air Quality Standards.

(iv) Dow shall retain the services of a consultant(s) for air quality modeling and meteorological forecasting purposes (or otherwise provide such services) approved by the Chief, Air Quality Division. Any change in any consultant requires written authorization by the Chief, Air Quality Division, following a demonstration by Dow that the necessary services can be satisfactorily performed by another party.

(v) Dow shall provide the consultant(s) mentioned in subparagraph (iv), above, with a separate series of control strategies for each of the West Side and South Side Power Plants. Those strategies shall be based upon the combinations of boilers which may be available for operations at any time in the future. Each strategy shall itemize consecutive steps that specify changing modes of boiler operations such that the Power Plants' sulfur dioxide emissions can be incrementally reduced. The consultant(s) shall regularly recommend to Dow a strategy step which the consultant(s) has determined will assure at all times the maintenance of air quality as described in subparagraph (iii), above.

(vi) After the effective date of this Order, and until the air pollution control required in paragraph 8 becomes fully operational, Dow shall operate its boilers in accordance with a strategy step which will result in sulfur dioxide ground level concentrations at least as low as the ground level concentrations would be if the strategy step specified by the consultant mentioned in subparagraph (v), above, were followed.

11. REPORTING: Annually from the date of final adoption of this Consent Order, Dow shall submit to Staff (and upon request to the Commission) a report of its progress towards complying with the provisions of this Control Program and Supplementary Control System (including Attachments A and B). Any significant developments which would preclude compliance by Dow with any provision of this Consent Order shall be immediately transmitted in writing to the Staff and the Commission.

12. Dow and the Chief of the Air Quality Division of the Department of Natural Resources agree that this Consent Order, the supporting data, and all necessary data that may be requested by the U.S. Environmental Protection Agency which is available to the Staff or provided by Dow shall be transmitted to the U.S. Environmental Protection Agency for approval as a revision to the Michigan State Implementation Plan.

13. Dow and the Commission agree that this Consent Order shall rescind and supersede Consent Order No. 10-1977 only upon approval of this Consent Order as a revision to the Michigan State Implementation Plan by the U.S. Environmental Protection Agency.

14. The Commission expressly finds that it will be necessary to continue this Consent Order in effect on a yearly basis until December 31, 1982, at which time it is presently expected that the nuclear power plant being constructed by Consumers Power Company at Midland, Michigan, will be fully operational.

15. Dow and the Commission acknowledge that a public hearing on this abatement program was held on January 29, 1979. The Commission and Dow hereby consent to the enforcement of this Stipulation and

Consent Order in the same manner and by the same procedure for all Final Orders entered pursuant to Section 16 of Act 257 of the Public Acts of 1972, being Section 336.26 of the Michigan Compiled Laws, including but not limited to, enforcement by legal action brought under Act 257 of the Public Acts of 1972 and/or Act 127 of the Public Acts of 1970.

Approved as to Form and Content:
/s/ D. L. Rooke
THE DOW CHEMICAL COMPANY

Dated: 2/9/79

Approved as to Content:
/s/ Delbert Rector
Executive Secretary
Air Pollution Control Commission
Department of Natural Resources

Dated: February 13, 1979

Approved as to Form:
/s/ Stewart H. Freeman
Assistant Attorney General
Department of Attorney General

Dated: February 13, 1979

FINAL ORDER

This Commission having had opportunity to review the above stated Stipulation for Entry of Consent Order, and this Commission having authorized the Executive Secretary of the Air Pollution Control Commission as agent of the Commission to enter into Consent Orders,

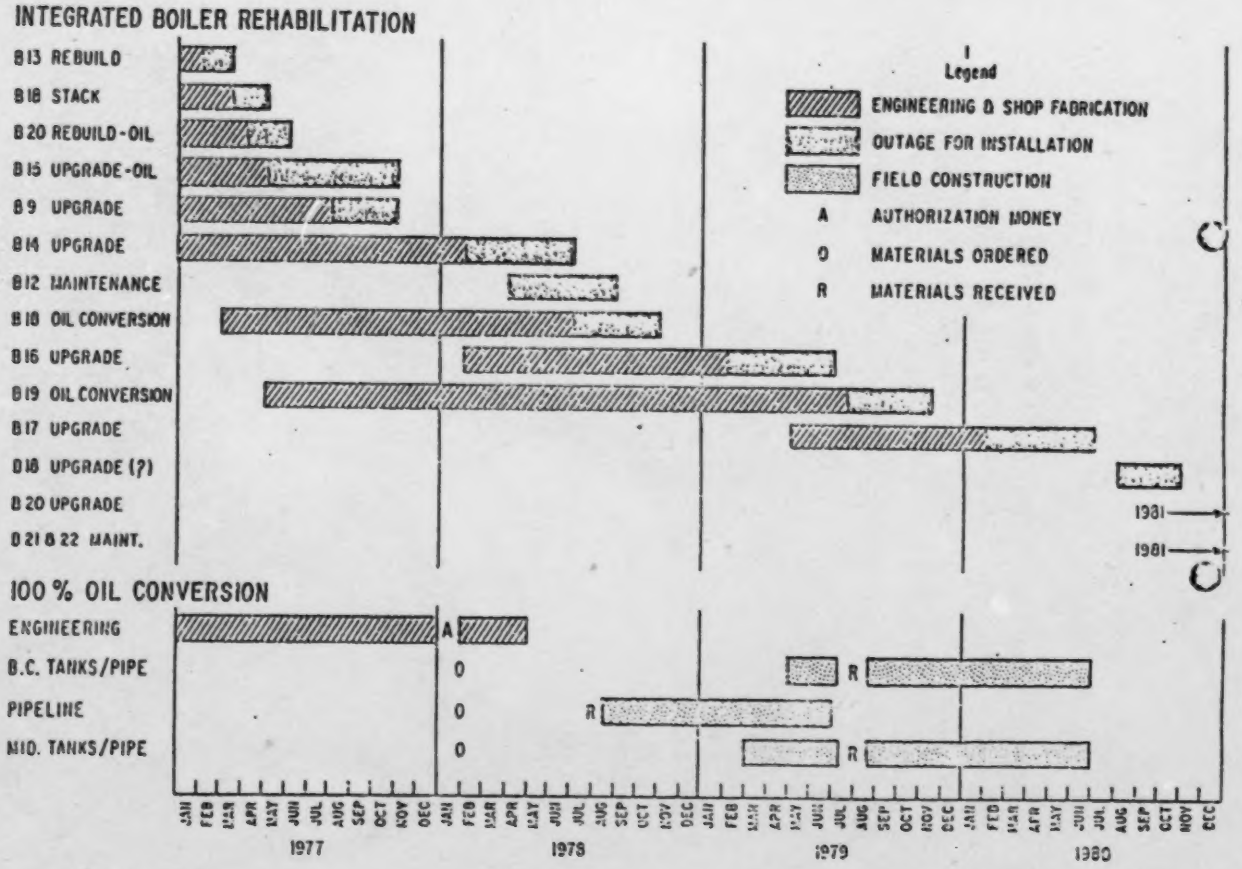
IT IS ORDERED that this Consent Order shall be entered in the record of this Commission as stated herein.

AIR POLLUTION CONTROL COMMISSION

By: /s/ Delbert Rector
Executive Secretary

Dated: February 13, 1979

Attachment A- INTEGRATED BOILER REHABILITATION AND OIL CONVERSION SCHEDULE



ATTACHMENT B

1) EVERY EIGHT (8) HOURS:

(i) Twenty-four (24) hours meteorological forecasts that the consultant(s) use in the dispersion model(s), including wind direction, wind speed, stability and mixing heights.

(ii) Recommended control strategy steps for subsequent 24 hours.

(iii) Predicted 3-hour and 24-hour running averages of sulfur dioxide concentrations for each of the subsequent 12 hours at each monitoring station and the maximum predicted 3-hour and 24-hour running averages of sulfur dioxide concentrations and their location. It is understood that the predictions for the maximum concentrations shall also be for each of the subsequent 12 hours.

2) DAILY:

(i) Summary of sulfur dioxide air quality data for previous day, including hourly averages and running 24-hour averages.

(ii) Boiler operation summary specifying actual operation. When strategy step calls for reduced operation from any boiler, the boiler operation summary shall include the boiler load reported as a percentage of full or nominal load.

(iii) Measured meteorological data, including wind speed, wind direction (including deviation), temperature, dew point temperature, and low level (10-91 meters) lapse rate as observed in Midland. Such data shall be submitted in an hourly format for the preceding 24 hours and shall include 10, 60 and 90 meter observations.

3) MONTHLY:

(i) Sulfur dioxide air quality data from all stations in SAROAD format.

4) AS REQUESTED:

(i) All amendments to control strategies, including supplementary steps not normally defined by the consultant(s) and amended meteorological forecasts, appropriate steps as they occur, and other information requested by staff relating to the operation of the SCS.

(ii) A report of all occurrences when the actual boiler operation did not follow the recommended strategy, including a demonstration as to whether or not the actual operation was equivalent to the recommended strategy with respect to its air quality impact.

DEPARTMENT OF NATURAL RESOURCES
STEVENS T. MASON BUILDING, BOX 30028
LANSING, MICHIGAN 48909

February 14, 1979

Mr. John J. McGuire
Regional Administrator
U.S. Environental Protection Agency
230 South Dearborn Street
Chicago, Illinois 60604

Dear Mr. McGuire:

Pursuant to the authority vested in me by Governor Milliken, I am submitting for your review and approval a revision to Michigan's State Implementation Plan. The revision contemplates extending the compliance date for particulate and sulfur dioxide emissions from the power

plants at the Dow Chemical Company's complex in Midland, Michigan, until December 31, 1982, and allowing, on an interim basis, the operation of a Supplementary Control System. In approving the company's request for an extension to their compliance date, the Michigan Air Pollution Control Commission found that operation of the company's Supplementary Control Commission would ensure maintenance of the federal primary and secondary ambient air quality standard for sulfur dioxide and maintenance of the federal primary ambient air quality standard for particulate matter. The Commission also found that denial of the company's request to extend their compliance date from the previous commitment of July 1980 to December 31, 1982, would cause economic hardship to the company, community, and state.

The following documents are being sent under separate cover to assist your staff in their review:

No.	Title
1	Request for Extension of Sulfur Dioxide Date for Dow Midland Power Houses (November 1978)
2	Supplementary Control System Demonstration (Volumes 1 & 2)
3	Addendum to Modification and Validation of the Operating Version AQFOR (October 1978)
4	Responses to Questions 1-13 of Delbert Rector's Letter Dated November 6, 1978, except for the Brinewell Publications (November 16, 1978)
5	Transcript of November 21, 1978, Michigan Air Pollution Control Commission Meeting
6	Transcript of December 19, 1978, Michigan Air Pollution Control Commission Meeting

7 Transcript of January 29, 1979, Public Hearing in Midland on Proposed Consent Order.

8 Staff Activity Report Summarizing the Public Hearing in Midland (February 8, 1979)

9 Stipulation for Entry of Consent Order and Final Order, APC No. 01-1979 (February 1979)

10 Michigan Department of Commerce Letter Providing Additional Information on Oil Costs (February 12, 1979)

I have included two sets of all documents, except for Dow's annual financial reports which are part of Item No. 4. One set of the financial reports is included.

I would like to provide brief comment on some of the documents submitted with this revision request. Volume I of Item No. 2, Supplementary Control System Demonstration, provides an overview description of the system, an historical summary of the results of four years of operation of the SCS, and a detailed description of the model. Further, an examination of 12 adverse meteorological conditions (either observed or "worst case") is described.

The SCS model has been continually validated and improved. The last significant model improvement was made in 1977 and dealt with unusual downwash conditions caused by high wind shear. Since that improvement, no exceedances of either the primary or secondary federal ambient air quality standard for sulfur dioxide have been observed at any of the eight monitoring sites in the vicinity of the plants. Staff of the Air Quality Control Division and the Michigan Air Pollution Control Commission are convinced that Dow's SCS system is effective and capable of preventing any ambient sulfur dioxide air quality standard violations.

The response to my questions (Item No. 4) provide further information and documentation on the matter of economic hardship and infeasibility. The Michigan Department of Commerce's letter (Item No. 10) provides an independent assessment of the projected oil costs and concludes that Dow's estimates may be too low. The Commerce Department's letter was not received in time to be made part of the public record but is included herein for informational purposes.

We believe that it will be particularly beneficial to note the comments offered by the public at the two Michigan Air Pollution Control Commission meetings (Items No. 5 and No. 6). The input from local citizens, union personnel, other business people, and local elected officials was valuable to the Commission in their deliberation.

A couple features of the Final Order (Item No. 9) merit discussion. First, the Commission found that burning oil and gas as principal fuels commencing July 1, 1980, for a period of two and one-half years was not presently an economically feasible control method. Second, the order requires that Dow be in continous compliance with all applicable emission standards by December 31, 1982, regardless of the operational status of the nuclear power plant currently under construction in Midland.

In summary, the Michigan Air Pollution Control Commission has found that it is economically infeasible to require full compliance with the State emission limits until December 31, 1982. They are confident, however, that all federal ambient air quality standards for sulfur dioxide and the primary standard for particulate matter will be maintained throughout the period of this extension by virture of the continued operation of Dow's

Supplementary Control System. I realize that some of the issues surrounding this proposed SIP revision are complex and that it will be a large task to read through all the supporting documents referenced in this letter. We will be happy to provide you with any additional information you deem necessary. I would suggest that any questions of a technical nature other than ones dealing with the Final Order be directed to Dan Meyer. Mr. Bob Miller can assist in any questions regarding the Final Order. Each of us may be reached at (517) 322-1330.

We appreciate your cooperation and assistance in this matter and look forward to early approval of this SIP revision.

Very truly yours,
/s/ Delbert Rector, Chief
Air Quality Division

DR:dmh
cc:D.D. DeLine
Mike Koryto
Stewart H. Freeman

Minutes of Meeting

MICHIGAN AIR POLLUTION
CONTROL COMMISSION

November 22, 1977
Lansing, Michigan

Commissioners Present:
Maurice S. Reizen, M.D., Chairman
Watson A. Gilpin, M.D.
Edward J. Klopp, Jr., M.D.
Mr. George H. Reicks

Mr. Philip L. Richards
Mr. O. J. Scherschligt
Mr. Edwin S. Shannon
Mr. Morton Sterling
Mr. Ronald Spenski, representing Department of Agriculture

Commissioners Absent:
Mrs. Mary L. Graves
Mr. Robert L. Henry, Jr.
Mr. Stanley R. Quackenbush

Staff Members Present:
Mr. Thomas Schimpf, Department of Attorney General
Mr. Lee E. Jager, Executive Secretary
Mr. Dennis Armbruster
Mr. Gerald L. Avery
Ms. Gay Cowles
Mr. Dennis Drake
Ms. Barbara Gass
Ms. Mary Ann Halbeisen
Mr. L. J. Holmes
Mr. Richard S. Johns
Mr. Daniel F. Meyer
Mr. Delbert Rector
Mr. Paul R. Shutt
Mr. Milo D. Smith
Mr. Benjamin E. White

Others Present:
Mr. D. M. Aldorfer, General Motors Corporation
Mr. Albert Almy, Michigan Farm Bureau
Ms. Penny Ancel, Senate Republican Office
Mr. E. R. Bangel, GMC, Chevrolet Motors Division
Mr. Gary P. Boszak, GMC, Assembly Division
Mr. D. H. Brandt, D. H. Brandt Associates

Mr. John W. Brophy, Product Recovery & Energy Company
Mr. E. F. Brush, Lansing Board of Water & Light
Mr. Jonathan Cain, Governor's Office
Mr. Ron Callen, Michigan Public Service Commission
Mr. D. F. Casteele, Lansing Board of Water & Light
Mr. L. F. Charla, GMC, Assembly Division
Mr. A. Crabtree, Michigan Public Service Commission
Mr. Geoffrey Crandal, Michigan Public Service Commission
Mr. Kenneth E. Dowell, Clayton Environmental Consultants
Mr. Ruben Essary, Traverse Corporation
Mr. Jens C. Faeborg, Product Recovery & Energy Company
Mr. Don Fry, Fry Stock Farm, Marlette
Mr. John E. Garner, Total Petroleum, Inc.
Mr. James J. Gessner, The Detroit Edison Company
Mr. Ivan Hanner, Hillcrest Center, Howell
Rep. Quincy Hoffman, 77th District
Mr. Tony Houston, Ford Motor Company
Mr. Wallace A. Huggett, Huggett Sod Farm, Inc., Marlette
Mr. D. M. Ilgenfritz, The Dow Chemical Company
Mr. Norman J. Kerr, Macomb County Health Department
Mr. Richard Kieft, GMC, Pontiac Motor Division
Mr. Ralph E. Magnuson, Jr., The Cleveland-Cliffs Iron Co.
Mr. Bruce R. Maters, Attorney, Detroit Edison Company
Mr. Ken Miller, Marlette
Mr. Dennis R. Minano, General Motors Corporation
Mr. Stephen Mooney, Muskegon County Health Department

Mr. Thomas F. O'Masta, Consumers Power Company
Mr. Joseph A. Orloff, GMC, Assembly Division
Mr. E. J. Piasecki, General Motors Corporation
Mr. Ron Presley, Champion International
Mr. Alex Sagady, Michigan Lung Association
Mr. Harry M. Schaeffer, Ford Motor Company
Mr. Erick Schneidawind, Michigan Public Service Commission
Mr. Jack L. Sheneberger, Dow Corning Corporation
Mr. Tom Sinclair, Dow Chemical Company
Mr. Charles Smith, The Detroit Edison Company
Mr. M. H. Stehman, Champion International
Mr. Norman J. Stevens, The Detroit Edison Company
Mr. Julian Szten, Muskegon County Health Department
Mr. P. Thelen, Lansing Board of Water and Light
Mr. Duane Thompson, Marlette
Mr. Michael J. Tyro, General Motors Corporation
Mr. A. E. Valentine, National Gypsum Company
Mr. Ronald J. VanMersbergen, U.S. Environmental Protection Agency
Mr. Joe Wolfe, Lansing Board of Water and Light

Chairman Reizen called the 137th regular meeting of the Commission to order at 9:10 a.m., and eight commissioners were present. The staff announced there were no additions to the agenda.

Approval of Minutes of Previous Meeting

The staff presented the proposed minutes of the Commission's October 17 and 18, 1977, meeting held in Benton Harbor, Michigan.

Minute 1411: Commissioner Richards moved approval of the October 17 and 18, 1977, minutes as submitted. The motion was supported by

Commissioner Shannon, all commissioners present voting therefore (8-0).

Executive Secretary's Report

The Commission discussed their proposed calendar of meetings for 1978, and the Commission consensus was to schedule the meetings as follows: January 17 in Lansing; February 21 in Saginaw; March 21 at Michigan State University; April 17 and 18 in Muskegon; May 16 in Lansing, June 19 and 20 in Marquette; July 18 in Lansing; August 14 and 15 in Traverse City; September 19 in Lansing; October 17, Lansing; November 21, Lansing; December 19, Lansing.

Mr. Jager reported on the status of requests from the Detroit Edison Company to install oil firing equipment at the Hancock and Northeast Stations and to obtain a variance from the Commission's Rule 41(c) for visible emissions from the St. Clair Power Plant, Unit 6. Both of these matters will be scheduled for Commission consideration in December.

Mr. Jager also reviewed studies underway to amend the State Implementation Plan (SIP) for total suspended particulates in the Detroit Metropolitan area, photochemical oxidants in southern Michigan, and carbon monoxide in Saginaw. The staff indicated that carbon monoxide air quality standards are not being met in the Saginaw area as a result of emissions from the General Motors Corporation's Chevrolet Modular Iron and Grey Iron Casting Plants. The staff indicated that if they do not receive a commitment from the company to abate the carbon monoxide emissions, they will be recommending the Commission adopt source emission standards for carbon monoxide through a SIP revision. Commissioner Sterling suggested that the Commission

should proceed with a complaint against the company if an agreement is not reached.

Legal Counsel's Report — none

Disbursement of Surveillance Fees

Mr. Milo Smith presented the staff report on the request from the Macomb County Health Department for reimbursement of funds to be expended for air pollution control activities performed by the county during their fiscal year beginning January 1, 1978, to December 31, 1978. The staff recommended the Commission adopt a proposed resolution recommending that the Director of the Department of Natural Resources disburse $55,000 to the Macomb County Health Department.

Minute 1412: Commissioner Shannon moved the Commission adopt the following resolution. The motion was supported by Commissioner Sterling, all commissioners present voting therefor by roll call vote (present and voting: Commissioners Gilpin, Klopp, Reicks, Scherschligt, Shannon, Sterling, and Chairman Reizen):

WHEREAS, the Macomb County Health Department made application to the Department of Natural Resources for disbursement to the Macomb County Health Department of surveillance fees under Section 14a of Act 348, P.A. 1965, as amended; and

WHEREAS, the Macomb County Health Department is prohibited by Section

14a(2) of said Act from assessing any type of fee for its air pollution operations; and

WHEREAS, the said application includes a complete description of the applicant's entire air pollution control program, an itemized statement of surveillance fee related costs expected to be incurred or borne during the period January 1, 1978, through December 31, 1978, including delineation and justification of that portion of its air pollution control program to be funded by surveillance fees and a description of how the applicant will coordinate its air pollution program with the state air pollution control program and the compatibility of the applicant's program with the state program; and

WHEREAS, the application has been reviewed by the Air Pollution Control Commission;

NOW THEREFORE BE IT RESOLVED that the Air Pollution Control Commission makes the following affirmative findings of fact:

1. The air pollution control program of the Macomb County Health Department, for which surveillance fees have been requested, is adequate to perform the duties assigned to that agency in the Michigan Implementation Plan for

air pollution control and is compatible with the air pollution control program conducted by the Michigan Air Pollution Control Commission and the Michigan Department of Natural Resources.

2. That portion of cost (increased surveillance, investigation, and other activities necessary to provide greater protection of the air of this state and for attainment and maintenance of national ambient air quality standards) for the overall air pollution control program borne by the Macomb County Health Department amounts to not less than $55,000.

AND BE IT FURTHER RESOLVED that, as a result of the affirmative findings stated above, the Air Pollution Control Commission recommends that the Director of the Department of Natural Resources disburse to the Macomb County Health Department the sum of $55,000 subject to legislative appropriations for the state fiscal year beginning October 1, 1978, and subject to surveillance fee collections during that fiscal year.

In addition, the staff reported that the Muskegon County Health Department has requested reimbursement of $52,218 from the surveillance fees for air pollution control activities to be conducted during the fiscal year from January 1, 1978, to December 31, 1978. Muskegon County's request included an increase of $14,400

identified as inflationary costs and indirect costs. Since this increase was not included in the legislative appropriation, the staff recommended that only $37,800 be disbursed to Muskegon County and proposed a resolution for the Commission's consideration. Mr. Julian Sztan, Chief of the Air Pollution Control Division, Muskegon County Health Department, reviewed alternatives the county would explore to obtain additional funds.

Minute 1413: Commissioner Klopp moved the Commission adopt the following resolution. The motion was supported by Commissioner Scherschligt, all commissioners present voting therefor (present and voting: Commissioners Gilpin, Klopp, Reicks, Richards, Scherschligt, Shannon, Sterling, and Chairman Reizen):

WHEREAS, the Muskegon County Health Department made application to the Department of Natural Resources for disbursement to the Muskegon County Health Department of surveillance fees under Section 14a of Act 348, P.A. 1965, as amended; and

WHEREAS, the Muskegon County Health Department is prohibited by Section 14a(2) of said Act from assessing any type of fee for its air pollution operations; and

WHEREAS, the said application includes a complete description of the applicant's entire air pollution control program, an itemized statement of

surveillance fee related costs expected to be incurred or borne during the period January 1, 1978, through December 31, 1978, including delineation and justification of that portion of its air pollution control program to be funded by surveillance fees and a description of how the applicant will coordinate its air pollution program with the state air pollution control program and the compatibility of the applicant's program with the state program; and

WHEREAS, the application has been reviewed by the Air Pollution Control Commission;

NOW THEREFORE BE IT RESOLVED that the Air Pollution Control Commission makes the following affirmative findings of fact:

1. The air pollution control program of the Muskegon County Health Department, for which air surveillance fees have been requested, is adequate to perform the duties assigned to that agency in the Michigan Implementation Plan for air pollution control and is compatible with the air pollution control program conducted by the Michigan Air Pollution Control Commission and the Michigan Department of Natural Resources.

2. That portion of cost (increased surveillance, investigation, and other activities necessary to provide greater protection of the air of this state and for the attainment and maintenance of national ambient air quality standards) for the overall air pollution control program borne by the Muskegon County Health Department amounts to not less than $37,800.

AND BE IT FURTHER RESOLVED that, as a result of the affirmative findings stated above, the Air Pollution Control Commission recommends that the Director of the Department of Natural Resources disburse to the Muskegon County Health Department the sum of $37,800 subject to legislative appropriations for the state fiscal year beginning October 1, 1977, and subject to surveillance fee collections during that fiscal year.

Designation of Attainment Status

The federal Clean Air Act Amendments of 1977 require states to submit to the Environmental Protection Agency (EPA) lists denoting the attainment and non-attainment status of all geographic areas with respect to the National Ambient Air Quality Standards. Mr. Delbert Rector presented a report on the available air quality data for total suspended particulates, sulfur dioxide, nitrogen dioxide, carbon monoxide, and photochemical oxidants. The staff recommended the Commission announce its intent to adopt the proposed geographic designations of

attainment status and hold a public hearing on the proposed designations at the Commission's December meeting. The staff recommended geographic areas be designated as follows:

(1) Total Suspended Particulates: Primary standards are being met in all areas of the state, except portions of Calhoun, Saginaw, and Wayne Counties. Secondary standards are being met in the state, except for portions of Bay, Berrien, Delta, Emmet, Genesee, Ingham, Kent, Macomb, Manistee, Marquette, Mason, Midland, Monroe, Muskegon, Oakland, Saginaw, St. Clair, Washtenaw, and Wayne Counties.

(2) Sulfur Dioxide: Primary standards are being met in all areas of the state, except portions of Ingham and Midland Counties.

(3) Nitrogen Dioxide: All areas of the state are being proposed to be designated as an attainment area.

(4) Carbon Monoxide: Primary standards are being met in the state, except portions of Macomb, Oakland, Saginaw, and Wayne Counties.

(5) Photochemical Oxidants: Thirty-seven counties in southern Michigan, including Bay, Gratiot, Huron, Kent, Midland, Montcalm, Muskegon, Tuscola, and all counties south of those named, are proposed to be designated as non-attainment for oxidant standards. The remaining 46 counties in northern Michigan are being proposed as an attainment area.

The staff reported that they were recommending portions of Ingham and Midland Counties be designated as non-attainment areas for sulfur dioxide standards, because they had received communication from the Environmental Protection Agency stating that an area cannot be considered as an attainment area if a source is operating a Supplementary Control System (SCS) in order to meet the air quality standards. The Dow Chemical Company is operating under a SCS program in Midland County, and the Lansing Board of Water and Light is operating under a SCS program in Ingham County.

Mr. Ronald J. VanMersbergen of the Air Programs Branch, Region V, U.S. Environmental Protection Agency, reviewed EPA's policy on emission offsets. Mr. VanMersbergen stated that EPA is considering a proposal to have the applicability of the off-set policy be determined on the basis of potential emission rates. He further stated that the offset policy will apply in areas not meeting secondary standards as well as in areas not meeting the primary standards. The staff indicated they were getting different responses from EPA as to whether or not the offset policy would apply in secondary non-attainment areas and that they would request an official statement in writing from the Environmental Protection Agency.

Minute 1414: Commissioner Klopp moved the Commission support staff's recommendation, as outlined in Items 1 through 5 above, and conduct a public hearing on the proposed designation of atatinment status at their December 20, 1977, meeting. The motion was supported by Commissioner Richards

and passed by a vote of seven to zero (present and voting: Commissioners Gilpin, Klopp, Reicks, Richards, Scherschligt, Sterling, and Chairman Reizen; Commissioner Shannon abstained).

Consumers Power Company, Essexville, Muskegon, and West Olive

At the Commission's October 18, 1977, meeting, the staff reported on an application from Consumers Power Company to defer compliance with sulfur dioxide emission standards until January 1, 1985, at the J. C. Weadock Plant in Essexville, the B. C. Cobb Plant in Muskegon, and the J. H. Campbell Plant in West Olive. At that time, the Commission deferred action on the request pending additional information to be submitted by the company.

Mr. Dan Meyer reported that the company has requested that this matter be postponed until the December meeting; however, since this matter was a scheduled agenda item, the staff recommended the Commission listen to any public comments at this time.

Mr. Ron Callen, Director of Scientific Research and Evaluation for the Michigan Public Service Commission, and Mr. Eric Schneidewind, Director of the Office of Policy for the Public Service Commission, presented their analyses of the Consumers Power Company's proposal. The Public Service Commission recommended to the Air Pollution Control Commission that additional sulfur dioxide controls not be required unless the costs are justified.

The Commission deferred further discission on this matter until their December 20, 1977, meeting.

Lansing Board of Water and Light

The Lansing Board of Water and Light operates a Supplementary Control System (SCS) for the control of sulfur dioxide emissions; however, on numerous occasions the Commission's staff has reported violations of the ambient air quality standards due to the operation of the Board's Eckert Station. On June 16, 1977, an alteration of the Board's Consent Order No. 11-1975 was signed which required that after July 1, 1977, should any sulfur dioxide excursions occur, the Board would be required to implement a control strategy within nine months to comply with Tables 3 and 4 of Rule 336.49.

Mr. Dennis Drake reported that on August 27 and 28, 1977, a 24-hour sulfur dioxide excursion was recorded, which the statff believed was caused by the Board's Eckert-Moores Park Station. By letter dated October 28, 1977, the staff officially notified the Board of the excursion and ordered them to submit a control strategy to the Commission within 60 days for compliance with Tables 3 and 4 of Rule 336.49.

Mr. Earl F. Brush, General Manager of the Board of Water and Light, stated that they did not believe the monitoring data was valid since the monitor was installed in a building without air conditioning. Brush argued that the temperature in the building may have reached 100 degrees on August 27 which may have caused the monitor to read erroneously, and therefore the data should be disregarded.

Mr. Alex Sagady presented a statement for the Michigan Lung Association supporting the action taken by the Air Quality Division to require the Board to convert to

low sulfur coal within nine months. Mr. Sagady also stated it was the position of the Michigan Lung Association that the real time monitoring connections from the Board to the DNR monitors be severed at the earliest opportunity.

Mr. Jager indicated the staff would be conducting a test on the monitor to determine what effect temperature would have on the readings.

Minute 1415: Commissioner Gilpin moved the Commission support staff's notification to the Lansing Board of Water and Light to proceed under the terms of Consent Order No. 11-1975 which requires the Board to submit a control strategy for sulfur dioxide by December 28, 1977. The motion was supported by Commissioner Scherschligt.

Commissioner Shannon spoke against the motion, stating he would like more evidence on the accuracy of the monitor which recorded the excursion.

Minute 1416: Commissioner Richards moved to table the motion, Minute 1415, for one month. Commissioner Shannon supported the motion which passed by a vote of four to three (Voting yes: Commissioners Klopp, Richards, Shannon, and Sterling; Voting no: Commissioners Gilpin, Scherschligt, and Chairman Reizen).

The Commission recessed for lunch at 12:00 noon and reconvened at 1:10 p.m.

Public Comment: None

Huggett Sod Farm, Inc., Marlette

The Huggett Sod Farm operates a grass dehydration facility which was installed in 1974 without an air use permit. Mr. Benjamin White presented a staff report on this facility and stated that a cease and desist letter was sent to the company on August 23, 1977, because the emissions from the facility were in excess of the Commission's rules. In October the staff issued a Permit to Install to the company containing conditions which require dust collection equipment to be installed and operating by April 1, 1978. The company has requested a variance from the Commission's emission limits; however, the staff did not recommend granting a variance, because the company is unwilling to agree to a compliance schedule.

Mr. Wallace A. Huggett, owner of the Huggett Sod Farm, testified that it would cause an undue hardship to install air pollution control equipment on the grass dryer, since it is only a marginal operation. He stated he operates the dryer from May until mid-September and that the emissions are not of a chemical nature.

Mr. Ronald Spenski entered the meeting at 1:30 p.m. to represent the Director of the Department of Agriculture on the Commission in Commissioner Quackenbush's absence.

Representative Quincy Hoffman appeared at the Commission meeting and submitted a letter he received, signed by 18 persons, supporting Mr. Huggett's sod farm operation. Representative Hoffman stated he had visited the site and requested the Commission to consider the remote location and grant a variance in this case. Three neighbors of the Hugett Sod Farm all testified that they were not bothered by either smoke or dust emissions

from the facility: (1) Ken Miller; (2) Don Fry; and (3) Duane Thompson. Mr. Miller submitted a petition signed by 16 neighbors and adjacent property owners requesting the Commission to grant the Huggett Sod Farm relief from particulate matter and opacity emission standards. Mr. Albert Almy, Director of Public Affairs for Michigan Farm Bureau, requested the Commission grant a variance to the company, since there were no complaints from the neighbors and the facility is in an isolated rural area. A letter from Louis J. Kennedy, Director of Environmental Health, Sanilac County Health Department, which stated the health department had found no violations nor received any complaints, was submitted for the record.

Commission discussion followed and the staff suggested the issuance of a permit, substituting Conditions 15 and 16 with a condition that if in the future the Commission determines that emissions from the process are in violation of the rules, the Commission shall notify the permittee to submit a compliance program within 90 days.

Minute 1417: Commissioner Scherschligt moved the Commission amend the Huggett Sod Farm's Permit to Install No. 433-77 by deleting Conditions 15 and 16 and adding the following condition: "If the Air Pollution Control Commission determines in the future that emissions from the process covered by this permit are in violation of the rules of this Commission and so notifies the company, the permittee shall within 90 days submit a program to satisfactorily abate these

emissions. Upon failure to comply with this condition, this permit shall be void." The motion was supported by Commissioner Shannon, all commissioners present voting therefor (present and voting: Commissioner Gilpin, Klopp, Reicks, Richards, Scherschligt, Shannon, Sterling, Spenski, and Chairman Reizen).

General Motors Corporation, Assembly Division, Ypsilanti

The General Motors Corporation has applied for a permit to install an entirely new paint shop facility to replace their existing facility at the GM Assembly Division in Ypsilanti. On April 19, 1977, the Commission referred this application to a hearings examiner to determine whether this facility would be subject to the Environmental Protection Agency's emission offset policy.

Mr. Richard Johns reported that the hearings examiner has concluded that this facility is not subject to the guidelines of the EPA's offset policy and proposed the Commission should issue the Permit to Install. Therefore, staff recommended the Commission approve the permit with the special condition as they were submitted to the hearings examiner.

Mr. Ronald Spenski left the meeting at 2:10 p.m.

General Motors Corporation was represented by Mr. Leonard F. gcharla, legal counsel and Mr. Joseph A. Orloff, Plant Engineer for GM Assembly Division. Mr. Charla indicated the corporation was in agreement with the permit conditions, except they requested that the emission limit for volatile organic compounds be

expressed in pounds per hour only and that the condition limiting those emissions to 5,226 tons per year be deleted. Discussion followed and the staff and Commission both indicated they believed there should be a limit on the total yearly emission of violatile organic compounds.

Minute 1418: Commissioner Richards moved the Commission approve the issuance of Permit to Install No. 62-77 to General Motors Corporation, Assembly Division, subject to the conditions recommended by staff. The motion was supported by Commissioner Shannon.

Commissioner Sterling spoke against the motion, stating that he agreed with EPA's arguments that the facility should be subject to the emission offset policy and urged denial of the permit.

Mr. Ronald J. VanMersbergen of the Environmental Protection Agency stated that EPA's position was that replacement facilities do come under the emission offset policy and that the Clean Air Act amendments endorsed the EPA's offset policy, effective immediately.

The Commission voted on the above motion, Minute 1418, which passed by a vote of five to two (Voting yes: Commissioners Gilpin, Klopp, Richards, Scherschligt, and Shannon; Voting no: Commis ioner Sterling and Chairman Reizen; Abstaining: Commissioner Reicks).

Dow Chemical Company, Midland

Commissioners Shannon and Reicks abstained from participation in this agenda item.

In July, 1977, the Dow Chemical Company entered into Stipulation for Entry of Consent Order and Final Order, APC No. 10-1977, with the Commission which provides for the operation of a Supplementary Control System (SCS) until July 1, 1980, at which time the Company will utilize fuel in compliance with Tables 3 and 4 of Rule 336.49. Mr. Lou W. Pribila and Mr. Bill Potter, representing Dow Chemical Company, requested the Commission to direct staff to submit their Consent Order No. 10-1977 to the Environmental Protection Agency (EPA) as a revision to the Michigan State Implementation Plan. Mr. Pribila explained that the company cannot proceed with the implementation of the terms of the Consent Order without risking enforcement action by EPA, unless it is approved as a revision to the SIP by EPA.

Mr. Ronald VanMersbergen, representing the Environmental Protection Agency, stated that it is EPA's position that they should not approve this Consent Order as a SIP revision. Based on Section 123 of the Clean Air Act, EPA feels they do not have the flexibility of approving a SCS for meeting ambient standards.

The staff recommended the Commission not submit the company's Consent Order as an amendment to the SIP, since the EPA has stated they cannot approve it. The staff indicated the company should be encouraged to work with the Attorney General's Office to obtain an order through open court to be submitted to EPA.

Minute 1419: Commissioner Klopp moved the Commission deny Dow Chemical

Company's request to submit their Consent Order No. 10-1977 as an amendment to the State Implementation Plan. The motion was supported by Commissioner Richards, all commissioners present voting therefor (present and voting: Commissioners Gilpin, Klopp, Richards, Scherschligt, Sterling, and Chairman Reizen).

Champion International, Gaylord

Champion International has applied for a permit to install a particleboard drying facility in Gaylord, Michigan. Mr. Richard Johns reviewed the staff's analysis of the permit application and indicated that a public comment period was announced which expired on November 18, 1977; however, no comments were received. The staff recommended the Commission approve the permit subject to the conditions submitted for public comment period. Representatives of Champion International present were Mr. Ron Presley, Manager of Environmental Affairs, and Mr. M. H. Stehman, Operations Manager.

Minute 1420: Commissioner Scherschligt moved the Commission approve the issuance of Permit to Install No. 245-77 to Champion International subject to the conditions recommended by staff. The motion was supported by Commissioner Sterling, all commissioners present voting therefor (present and voting: Commissioners Gilpin, Klopp, Reicks, Richards, Scherschligt, Shannon, Sterling, and Chairman Reizen).

General Motors Corporation, Pontiac Motor Division, Pontiac

Commissioner Reicks was absent from discussion on this agenda item.

Pontiac Motor Division installed several sanding, cleaning, and painting operations during the years 1968 through 1973 without obtaining air use permits. The company initiated permit applications for these facilities following a company-wide audit. On November 7, 1977, the staff issued a Notice of Violation and Order to Appear requesting the company's presence at the November Commission meeting. Mr. Johns reviewed the permit applications and reported that all equipment is operating in compliance with the Commission's rules, and therefore the staff recommended approval of the Permits to Install and Operate.

Minute 1421: Commissioner Klopp moved the Commission approve the issuance of Permits to Install and Operate, Nos. 662-77 through 674-77, to General Motors Corporation, Pontiac Motor Division, subject to the conditions recommended by staff. The motion was supported by Commissioner Shannon, all commissioners present voting therefor (present and voting: Commissioners Gilpin, Klopp, Richards, Scherschligt, Shannon, Sterling, and Chairman Reizen).

Representatives of General Motors Corporation present were Mr. Dennis R. Minano, Attorney; Mr. Richard Kieft, Plant Engineer, Pontiac Motor Division; and Mr. D. M. Aldorfer, Staff Project Engineer, GM Technical

Center. Mr. Minano stated that General Motors is conducting a major effort to assure that all their facilities have the appropriate permits and that they may be coming forth in the future with other facilities which did not receive air use permits.

Hillcrest Center, Howell

The Michigan Department of Mental Health operates the Hillcrest Center in Howell and installed an oil-fired boiler without obtaining an air use permit. Mr. Delbert Rector reviewed the staff report and revisions to the previously proposed permit conditions. The staff recommended that the new boiler not be operated until three boiler stacks are raised and the rain caps are removed. However, since there was concern that the boiler may have to be operated during winter months to meet heating requirements, the staff proposed revised conditions to allow emergency operation of the boiler under specific conditions.

Mr. Ivan Harner, Administrative Officer of the Hillcrest Center, was present and requested the Commission to approve the permit with the revised permit conditions.

Minute 1422: Commissioner Shannon moved the Commission approve the issuance of Permit to Install No. 201-77 to the Hillcrest Center, subject to the revised conditions recommended by staff. The motion was supported by Commissioner Klopp, all commissioners present voting therefor (present and voting: Commissioners Gilpin, Klopp, Reicks, Richards, Scherschligt, Shannon, Sterling, and Chairman Reizen).

Product Recovery and Energy Company, Union City

Product Recovery and Energy Company has applied for a permit to add a scrubber control system to an existing liquid waste incinerator in Union City that was shutdown in May of 1975. Mr. L. J. Holmes reviewed the staff analysis of the permit application. The staff recommended the permit be denied, because adequate buffer zones do not exist between the facility and nearby residences. The staff was concerned about odor nuisances and the uncertainties regarding the ability of the incinerator to adequately destroy unidentified toxic and hazardous chemicals.

Mr. John W. Brophy, President of Prenco, Inc., and Mr. Jens C. Faaborg, were present representing Product Recovery and Energy Company. Mr. Brophy stated they did not intend to take any drums on the site at all, only tank trucks. In addition, they would require companies to certify to what is in the waste, and all material would go through a filtering system and into a holding tank before it is burned.

Minute 1423: Commissioner Richards moved the Commission deny the application from Product Recovery and Energy Company for Permit to Install No. 546-77. The motion was supported by Commissioner Scherschligt, all commissioners present voting therefor (present and voting: Commissioners Gilpin, Klopp, Reicks, Richards, Scherschligt, Shannon, Sterling, and Chairman Reizen).

Ford Motor Company, Wayne Assembly Plant

Mr. Johns reported that the staff had issued a staff level waiver to Ford Motor Company to begin installation of

an oil-fired boiler at the Wayne Assembly Plant prior to receiving a Permit to Install. Staff is currently evaluating the permit application and recommended the Commission grant a continuance of the waiver. Ford Motor Company was represented by Mr. Harry H. Schaeffer, Principal Staff Engineer.

Minute 1424: Commissioner Shannon moved the Commission grant a waiver to the Ford Motor Company to continue installation of an oil-fired boiler at the Wayne Assembly Plant, with the stipulation that such construction without a permit is entirely at the company's own risk and that no operation will be allowed until a permit has been approved. The motion was supported, all commissioners present voting therefor (7-0). Commissioner Reicks abstained.

Traverse Corporation, Manistee County

The staff is preparing to announce a 21-day public comment period on a permit application (No. 395-77) from Traverse Corporation to install a gas sweetening facility in Maple Grove Township, Manistee County. On November 9, 1977, the staff issued a staff level waiver to the company to begin construction. The staff recommended the Commission grant a continuance of that waiver. Traverse Corporation was represented by Mr. Ruben Essary, Production Manager.

Minute 1425: Commissioner Klopp moved the Commission grant a waiver to Traverse Corporation to continue construction of a gas sweetening facility in Maple

Grove Township, with the stipulation that such construction without a permit is entirely at the company's own risk and that no operation will be allowed until a permit has been approved. The motion was supported by Commissioner Gilpin, all commissioners present voting therefor (8-0).

General Motors Corporation, Hydromatic Division, Ypsilanti

On November 14, 1977, the staff issued a waiver to General Motors Corporation to allow them to begin installation of a coal-fired boiler at the Hydromatic Division in Ypsilanti without an approved permit. The staff recommended the Commission grant a continuance of that waiver.

Minute 1426: Commissioner Richards moved the Commission grant a waiver to General Motors Corporation to continue construction of a coal-fired boiler at the Hydromatic Division in Ypsilanti, with the stipulation that such construction without a permit is entirely at the company's own risk and that no operation will be allowed until a permit has been approved. The motion was supported by Commissioner Sterling, all commissioners present voting therefor (7-0). Commissioner Reicks was absent for the vote.

* * * * * * * * *

Minute 1427: Commissioner Klopp moved the Commission instruct Chairman Reizen to write a letter to the Director of the Department of Agriculture informing him that a proxy commissioner should attend the entire meeting and not just to vote on one issue and leave. The motion was supported by Commissioner Richards and passed by a vote of seven to one (Voting yes: Commissioners Gilpin, Klopp, Riecks, Richards, Scherschligt, Sterling, and Chairman Reizen; Voting no: Commissioner Shannon).

The meeting adjourned at 5:00 p.m.

Maurice S. Reizen, M.D., Chairman

/s/ Mary Ann Halbeisen, Secretary

Minutes of Meeting

MICHIGAN AIR POLLUTION
CONTROL COMMISSION

December 20, 1977
Lansing, Michigan

Commissioners Present:

Mr. Philip L. Richards, Vice Chairman (9:00-3:15)
Mr. Robert L. Henry, Jr., Acting Chairman (3:15-5:35)
Watson A. Gilpin, M.D.
Mrs. Mary L. Graves
Edward J. Klopp, Jr., M.D.
Mr. Stanley R. Quackenbush
Mr. George H. Reicks

Mr. O. J. Scherschligt
Mr. Edwin S. Shannon

Commissioners Absent:
Maurice S. Reizen, M.D., Chairman
Mr. Morton Sterling

Staff Members Present:
Mr. Stewart H. Freeman, Department of Attorney General
Mr. Lee E. Jager, Executive Secretary
Mr. Richard L. Daye
Mr. Dennis M. Drake
Mr. Brian Guerrini
Ms. Mary Ann Halbeisen
Mr. L. J. Holmes
Mr. Richard S. Johns
Mr. R. Thomas Maki
Mr. Norris McDowell
Mr. Daniel F. Meyer
Mr. Robert P. Miller
Mr. Tim Monahan
Mr. J. James Novak
Mr. Delbert Rector
George C. C. Su, Ph.D.
Mr. Benjamin E. White

Others Present:
Loren W. Allen, Captain, Buena Vista Township Fire Department
John Altschettel, Saginaw
Sol P. Baltimore, American Lung Association of Southeast Michigan
E. R. Bangel, General Motors Corporation
D. H. Brandt, D. H. Brandt Associates
Kenneth Brockway, Consumers Power Company

Jack M. Brown, Dow Chemical Company
Earl F. Brush, Lansing Board of Water & Light
D. W. Bublits, Dow Corning Corporation Frank J. Clements, Great Lakes Steel
J. E. Counihan, President, Chemitron Corporation
A. Crabtree, Michigan Public Service Commission
Daryl Dauer, Saginaw
Charles V. DeCaria, Great Lakes Steel
Doug Diak, Environmental Health Director, Midland Health Department
Ruben Essary, Traverse Corporation
Anthony Fisher, General Motors Corporation
James Gessner, Detroit Edison Company
Dr. Stanley Greenfield, Consumers Power Company
R. S. Grettum, Gilbert/Commonwealth
Judy Haske, Buena Vista Township, Saginaw
Paul Hittle, Consumers Power Company
J. N. Howell, Great Lakes Steel
Stephen H. Howell, Consumers Power Company
J. David Hudgens, GMC, Chevrolet Motor Div., Flint
Mr. & Mrs. Wilbert Johnson, Buena Vista Twp., Saginaw
Gary Krause, Director of Planning, SEMCOG
John LaLonde, Chairman, Midland County Board of Health
Mel Laracey, Consumers Power Company
W. R. Lehmann, Cliffs Electric Service Company
James E. Leidlein, Township Manager, Buena Vista Twp.
Ralph E. Magnuson, Jr., Cleveland-Cliffs Iron Company
Delno D. Malzahn, American Natural Resources
Peter Marquardt, The Detroit Edison Company
B. Matters, Attorney, Detroit Edison Company

Donald Morgan, Bofors Lakeway, Washington, D.C.
Tom O'Masta, Consumers Power Company
Winifred A. Oyen, M.D., Midland Health Department
Frank P. Partee, Ford Motor Company
Norman Phaneuf, Bofors-Lakeway
Joseph Pollick, GMC, Chevrolet Modular Iron, Saginaw
William Potter, Attorney, Dow Chemical Company
Jerome P. Reif, Attorney, Buena Vista Township
Marvin W. Rethman, Building Inspector, Buena Vista Township, Saginaw
Michael Robinson, Bofors Lakeway, Inc.
Esther Ronk, Buena Vista Township, Saginaw
Alex Sagady, Michigan Lung Association
Dan Shaw, GMC, Chevrolet Motor Divison, Saginaw
Jack L. Sheneberger, Dow Corning Corporation
Hugh M. Smith, Bofors Lakeway
Mike Stafford, Attorney, Laro Coal
Norman J. Stevens, Detroit Edison Company
D. E. Syler, Consumers Power Company
Julian Szten, Muskegon County Air Pollution Control
Peter Thelen, Lansing Board of Water & Light
Allen E. Valentine, National Gypsum Company
Peter S. Walters, Office of Economic Expansion
Robert Wilkinson, Consumer Power Company
Robert Wolthius, Bofors-Lakeway, Inc.
Joette C. Woodward-Yank, Lansing Board of Water & Light

The 138th regular meeting of the Commission was called to order at 9:15 a.m. by Vice Chairman Richards, and seven commissioners were present for roll call. The staff announced there were no changes to the agenda.

Approval of Minutes of Previous Meeting

The staff presented the proposed minutes of the Commission's November meeting held in Lansing.

Minute 1428: Commissioner Shannon moved the Commission approve the November 22, 1977, minutes as submitted by staff. The motion was supported by Commissioner Henry and passed by a vote of 6-0 (Voting yes: Commissioners Shannon, Henry, Graves, Reicks, Klopp, and Vice Chairman Richards; Abstaining: Commissioner Quackenbush).

Executive Secretary's Report

Mr. Lee Jager announced he had been appointed to a position in the Department of Public Health and that effective January 21, 1978, he would be resigning as Executive Secretary to the Commission and Chief of the Air Quality Division.

The staff informed the Commission of the status of a control program at PENNDIXIE INDUSTRIES, INC. in Petoskey. The staff reported that the company was in agreement on a compliance schedule; however, the company has not yet agreed to enter into a consent order containing that compliance schedule. The staff recommended postponing this matter one month, and the Commission concurred.

The staff also informed the Commission of the status of a request from the DETROIT EDISON COMPANY for a variance from the visible emission limitations for Unit G at the St. Clair Power Plant. The staff stated they would be conducting a public hearing on a consent order which would include a compliance schedule for meeting the visible emission limitations.

The staff also informed the Commission that they had announced a public comment period on a permit

application from NORTH STAR STEEL COMPANY to construct a mini-steel mill in Monroe, Michigan.

Legal Counsel's Report

Mr. Stew Freeman reviewed the status of pending lawsuits with Berlin and Farro Liquid Incineration and the Dow Chemical Company.

Air Pollution Surveillance Fees

Mr. Richard Johns presented the staff recommendations for establishment of the unit cost of scheduled investigations, investigation difficulty and frequency factors pursuant to the Administrative Rules. Annual Reports and Surveillance Fees, Part 7, Rule 336.82. The staff recommended that the Commission propose to the Director of the Department of Natural Resources that the unit cost per scheduled investigation be set at $21.00 for the February 1, 1978, billing and that the difficulty and frequency factors remain unchanged from those used in the February 1, 1977, billing.

Minute 1429: Commissioner Shannon moved the Commission recommend to the Director of the Department of Natural Resources that $21.00 be established as the unit cost for air pollution surveillance fee billing of February 1, 1978, and that the difficulty and frequency factors used for the February 1, 1977, billing be used for the February 1, 1978, billing. The motion was supported by Commissioner Henry, all commissioners present voting therefor (7-0).

Shell Oil Company, Wexford Township, Wexford County

Shell Oil Company has requested approval to increase their processing rate of sour natural gas, which would allow an increase in sulfur dioxide emissions, at their gas

sweetening facility in Wexford Township. Mr. Richard Johns presented the staff report on the company's application and indicated that the staff had received two letters in support of the company's application. The staff recommended that the Commission approve the application, provided there are no adverse comments received by the end of the public comment period, December 20, 1977.

Minute 1430: Commissioner Shannon moved the Commission authorize the issuance of Permit to Install No. 235-74B to Shell Oil Company, subject to the conditions recommended by staff and provided there are no adverse comments received by December 20, 1977. The motion was supported by Commissioner Quackenbush, all commissioners present voting therefor (7-0).

Shell Oil Company, Excelsior Township, Kalkaska County

The Shell Oil Company also requested a permit to allow the increase of sulfur dioxide emissions at the Excelsior gas sweetening facility. Mr. Johns reviewed the permit application and indicated the staff recommended approval of the permit application, provided there are no adverse comments received by the end of the public comment period, December 30, 1977. Commission discussion followed on EPA's draft New Source Performance Standards which would require sulfur recovery plants on sweetening facilities that would emit more than 8,960 pounds per day of sulfur dioxide.

Minute 1431: Commissioner Klopp moved the Commission authorize the issuance of Permit to Install No. 322-74A to Shell

Oil Company, subject to the conditions recommended by staff and provided there are no adverse comments received by December 30, 1977. The motion was supported by Commissioner Graves, all commissioners present voting therefor (7-0).

Commissioner Gilpin entered the meeting at 10:00 a.m.

Consumers Power Company, Essexville, Muskegon, and West Olive

The Consumers Power Company has filed an application for extension to the sulfur dioxide emission limitations of Rule 49 for three plants: (1) the B. C. Cobb Plant, Units 1 through 5, in Muskegon; (2) the J. H. Campbell Plant, Units 1 and 2, in West Olive; and (3) the J. C. Weadock Plant, Units 7 and 8, in Essexville. The Commission considered this request at their November 22, 1977, meeting and postponed action for one month to allow the company and the staff to enter into further negotiations in an attempt to resolve outstanding issues and differences.

Mr. Dan Meyer presented a staff report and informed the Commission that during previous negotiations, the company had discussed substantial changes in a number of areas. First, the company discussed lowering the sulfur content in fuel to be burned at the Cobb Plan to 2.5 percent during 1980 and 1981 and to upgrade the precipitators by 1983 at which time they would burn 1.0 percent sulfur coal. The staff recommended the Commission grant the requested extension for the B. C. Cobb Plant until August 1983. The second proposal, to burn 2.8 percent sulfur fuel at the Campbell Plant from

1980 through 1985, was not altered by the company. The staff indicated that the precipitators at the Campbell Plant are presently capable of burning 1.0 percent sulfur coal and that the company did not make an adequate demonstration that the cost for compliance is unreasonably out of proportion. Therefore, the staff recommended the company's request for an extension at the Campbell Plant be denied and that they be required to meet the terms of their current order which specifies compliance by 1980. Thirdly, the company discussed lowering the sulfur content in fuel to be burned at the J. C. Weadock Plant to 2.5 percent until early 1983, at which time precipitator upgrades would be completed and the company would begin burning 1.0 percent sulfur fuel. However, the staff believed that the demonstration of achievement and maintenance of satisfactory ambient air quality has not been made by the company and recommended the request for extension for the Weadock Plant be denied.

The Consumers Power Company was represented by Mr. Stephen H. Howell, Vice President of Projects, Engineering and Construction; Mr. Paul Hittle, Director of Environmental Activities; Mr. Mel Laracey, Attorney; and Dr. Stanley Greenfield of Greenfield, Attaway and Tyler, San Rafael, California. Mr. Howell presented a statement urging the Commission not to require additional sulfur dioxide reduction controls at the Campbell, Cobb, and Weadock Plants. Mr. Hittle presented a statement supporting the company's request to: (1) continue burning 3.0 percent sulfur coal at the Weadock Units 7 and 8 until January 1, 1983, when 1.0 percent sulfur coal burning would commence; (2) continue burning 3.5 percent sulfur coal until August 1, 1983, at the B. C. Cobb Plant, when 1.0 percent sulfur coal burning would commence; and (3) burn 2.8 percent

sulfur coal at Campbell Units 1 and 2 until January 1, 1985, when 1.0 percent sulfur coal burning would commence. Dr. Greenfield reviewed how the federal government sets standards for air pollution control and concluded by stating there are no good data which support a sulfate standard.

Commissioner Scherschligt entered the meeting at 10:50 a.m. during Consumers Power Company's presentation.

Mr. Alex Sagady, representing the Michigan Lung Association, presented a statement which opposed the granting of the variances to Consumers Power Company.

Vice Chairman Richards announced time for public comment; however, there was no one present who desired to speak.

The Commission recessed for lunch at 11:45 a.m. and reconvened at 1:30 p.m.

Following the lunch recess, the Commission resumed discussion of the Consumers Power Company request. Mr. Del Rector summarized the staff's and the company's positions. First, they were pretty much in agreement with the Cobb Plant proposal, except the staff feels there should be an interim reduction in sulfur dioxide emissions and the company says they canot commit to that. In regard to the Weadock Plant, the staff and the company continue to be in disagreement on the air quality impact. In order to make a State Implementation Plan revision, the company must demonstrate that the program will not interfere with attainment or maintenance of the ambient air quality standards. Finally, the staff continues to believe that the company has not made an adequate demonstration on the cost-benefit ratio at the Campbell Plant. Commission discussion followed.

Minute 1432: Commissioner Scherschligt moved the Commission defer action on the Consumers Power Company's proposal until January 17, 1978, to give staff adequate opportunity to divide the issues and analyze them so the Commission can deal with them on a one-by-one basis. The motion was supported by Commissioner Graves and passed by a vote of five to three (Voting yes: Commissioners Gilpin, Graves, Henry, Scherschligt, and Vice Chairman Richards; Voting no: Commissioners Klopp, Quackenbush, and Shannon; Abstaining: Commissioner Reicks).

Bofors Lakeway Chemical, Muskegon

Bofors Lakeway Chemical Company produces a chemical known as dichlorobenzidine (DCB), a proven carcinogen and suspected human carcinogen, in Muskegon. Mr. Jack Novak presented a staff report which recommended the Commission deny two of the company's permits which relate to the production of DCB: (1) Permit to Operate No. 397-73 for ventilation control and two wet scrubbers; and (2) Permit to Install No. 584-77 to allow a change in the manufacture of DCB to use a hydrogenation process. The staff believed that DCB should be subject to an emission limit which provides for no detectable amount, using the most sensitive methods of testing available. Since the staff has not been adequately

assured that no DCB is being emitted from the exhaust of both of the company's wet scrubbers and the baghouse/filter combination, the staff concluded there may be an excessive risk to the environment due to operation of the DCB process and recommended denial of the permits.

Bofors Lakeway Chemical Company was representd by Mr. Michael Robinson, Attorney; Mr. Donal Morgan, Counsel to Chemical Manufacturers Association; Dr. Hugh M. Smith, Manager of Research Development and Environmental Affairs for Sun Chemical Corporation; Mr. James Barrett, President of Michigan State Chamber of Commerce; Mr. Normand Phaneuf, President of Bofors-Lakeway; and Mr. J. E. Counihan, President of Chemitron Corporation. Mr. Robinson requested a contested case hearing before a hearings officer and, pending the hearing, the Commission postpone action on the permits and allow the company to continue operating the DCB process. Mr. Morgan stated that studies have shown no increase in cancer in the work force in plants that manufacture DCB. Mr. Counihan stated that the pigment made from DCB is the only known pigment that will satisfy existing printing requirements. Mr. Barrett supported the company's request for a hearing and deferring action on the permits. Dr. Smith stated there is no scientific evidence at the present time that DCB causes cancer in humans.

Mr. Julian Szten of the Muskegon County Air Pollution Control Division, stated that they would like to have some assurances that discharges from Bofors-Lakeway

are not harmful to the people. Mr. Szten supported a public hearing in Muskegon and staff's proposal for a no detectable discharge limit.

The staff suggested that the company's statements should be reduced to a written document. The staff also supported deferring action for one month and conducting a public hearing in Muskegon; however, the staff warned that there is no assurance that further production of DCB in the interim would be safe. Commission discussion followed, and Commissioner Scherschligt indicated he believed the production of DCB should be suspended pending a hearing. Commission discussion followed. A motion to refer the matter to a hearings examiner was made but later withdrawn, at the request of the company, in favor of holding a public hearing in Muskegon first. There was also discussion favoring proposed rule making to establish monitoring procedures and emissions limits for DCB.

Minute 1433: Commissioner Quackenbush moved the Commission direct staff to hold a public hearing in Muskegon to hear the public views on the proposed permits to be issued to Bofors Lakeway Chemical Company by the Commission. The motion was supported by Commissioner Scherschligt, all commissioners present voting therefor (9-0).

Minute 1434: Commissioner Shannon moved Bofors Lakeway Chemical Company be allowed to continue operation for a period of 90 days; that they develop, in concert with the staff, a more sensitive method of analyzing for DCB in their emissions; and that in the interim there by a maximum emission limit of 0.25 ppm. The motion was supported by Commissioner Graves and passed by a vote of eight to one (Voting yes: Commissioners Gilpin, Graves, Henry, Klopp, Quackenbush, Reicks, Shannon, and Vice Chairman Richards; Voting no: Commissioner Scherschligt).

Mr. Robinson then requested that the company be granted a waiver to begin installation of the equipment for the hydrogenation permit with the understanding that such installation would be totally at the company's own risk.

Minute 1435: Commissioner Henry moved the Commission grant a waiver to Bofors Lakeway Chemical Company to begin installation of the equipment referred to in their application for Permit to Install No. 584-77, with the stipulation that such installation is entirely at the company's own risk and does not preclude the Commission from possibly denying the permit; in addition, no

Minute 1435: operation will be allowed until a permit has been approved. The motion was supported by Commission [sic] Quackenbush, all commissioners present voting therefor (9-0).

Vice Chairman Richards left the meeting at 3:15 p.m., and Commissioner Henry presided as Acting Chairman for the remainder of the meeting.

Designation of Attainment Status Pursuant to Section 107(d) of the Clean Air Act as Amended

The Commission held a public hearing on their proposed designation of areas which have attained and which have not attained federal ambient air quality standards, pursuant to Section 107(d) of the Clean Air Act as amended. In the staff report presented by Mr. Delbert Rector, the staff recommended two changes to the proposed designation as it was submitted for public hearing: (1) that portions of Marquette County be declared as unclassifiable for total suspended particulates; and (2) that Figure 30 be revised to include the entire Cities of Fraser, Clawson, Royal Oak, Romulus, Westland, Wayne, and Livonia in the non-attainment designation for carbon monoxide and the entire Cities of Bingham Farms and Beverly Hills in the attainment designation. The remainder of the staff's recommendations remained unchanged from the recommendations made at the Commission's November 22, 1977, meeting.

Statements were submitted at the public hearing by three industrial representatives and two local government representatives. First, Mr. John LaLonde,

Chairman of the Midland Board of Health, presented a statement requesting that Midland County be removed from the non-compliance designation for sulfur dioxide. Next, Mr. Jager read into the record a letter submitted by Mr. V. H. Sussman of the Ford Motor Company, which elaborated on three concerns: (1) boundary definition problems; (2) requirements in areas of secondary national air quality standard nonattainment; and (3) timing problems affecting industry decision making. The third statement was submitted by Mr. Jack Brown of Dow Chemical Company, requesting that the Commission designate the entire Midland County area as an attainment area with respect to sulfur dioxide emissions. Then Mr. Tom O'Masta of Consumers Power Company presented a statement which urged the Commission to carefully consider the effect a designation of the Dow area as a nonattainment area would have on the operation of the auxiliary boilers which Consumers Power plans to install at its Midland Plant in early 1978. The last statement was submitted by Mr. Gary Krause, Director of Planning, representing the Southeast Michigan Council of Governments (SEMCOG). Mr. Krause stated that SEMCOG agrees with the designation of the 37 county area as being a nonattainment area for oxidants; however, they recommended that the entire 7-county SEMCOG region be retained as a single maintenance area for the development and implementation of any subsequent Transportation Control Plan.

After discussion and considering the staff's recommendations and the comments received, the Commission took the following action :

Minute 1436: Commissioner Klopp moved the Commission adopt staff's recommendation to designate portions of

Calhoun, Saginaw, and Wayne Counties as nonattainment areas for primary air quality standards for total suspended particulates; designate portions of Bay, Berrion, Delta, Emmet, Genesee, Ingham, Kent, Macomb, Manistee, Mason, Midland, Monroe, Muskegon, Oakland, Saginaw, St. Clair, Washtenaw, and Wayne Counties as nonattainment areas for secondary air quality standards for total suspended particulates; and designate portions of Branch and Marquette Counties as unclassifiable. The motion was supported by Commissioner Shannon, all commissioners present voting therefor (present and voting: Commissioners Gilpin, Graves, Klopp, Quackenbush, Reicks, Scherschligt, Shannon, and Acting Chairman Henry).

Minute 1437: Commissioner Klopp moved the Commission declare the entire State of Michigan as an attainment area for ambient air quality standards for sulfur dioxide. The motion was supported by Commissioner Quackenbush and passed by a vote of five to one (voting yes: Commissioners Gilpin, Graves, Klopp, Quackenbush, and Acting Chairman Henry; voting no: Commissioner Scherschligt; abstaining: Commissioners Shannon and Reicks).

Minute 1438: Commissioner Shannon moved the Commission adopt the staff's recommendations to designate the entire State of Michigan as an attainment area for primary air quality standards for carbon monoxide, except portions of Macomb, Oakland, Saginaw, and Wayne Counties — including the entire Cities of Fraser, Clawson, Royal Oak, Romulus, Westland, Wayne, and Livonia as nonattainment areas and the entire Cities of Bingham Farms and Beverly Hills as attainment areas; and, in addition, designate the 37 counties in southern Michigan — including Bay, Gratiot, Huron, Kent, Midland, Montcalm, Muskegon, Tuscola, and all counties south of that line — as a nonattainment area for ambient air quality standards for photochemical oxidants and the remainder of northern Michigan as an attainment area. The motion was supported by Commissioner Klopp, all commissioners present voting therefor (present and voting: Commissioners Gilpin, Graves, Klopp, Quackenbush, Reicks, Scherschligt, Shannon, and Acting Chairman Henry).

Minute 1439: Commission designate the entire State of Michigan as an attainment area for ambient air quality standards for nitrogen dioxide. The motion was supported by Commissioner

Minute 1439: Quackenbush, all commissioners present voting therefor (present and voting: Commissioners Gilpin, Graves, Klopp, Quackenbush, Reicks, Scherschligt, Shannon, and Acting Chairman Henry).

National Steel Corporation, Great Lakes Steel Division, Detroit

In March 1976, the Great Lakes Steel Division of National Steel Corporation petitioned the Commission for an adjudicatory hearing on the classification of Great Lakes Steel's operations located at Zug Island, Ecorse, and River Rouge as three manufacturing locations for purposes of assessing surveillance fees. In the hearings examiner's Proposal for Decision, dated October 3, 1977, he found that Great Lakes Steel consists of two manufacturing locations for purposes of assessing surveillance fees: (1) the Zug Island power plant; and (2) the Zug Island/Ecorse-River Rouge facilities joined by the narrow strip of land. However, the Attorney General's office has filed exceptions to this Proposal for Decision.

Great Lakes Steel was represented by Mr. James N. Howell, Director of Environmental Control, and Mr. Frank J. Clements, Attorney. Mr. Clements requested the Commission to sustain the Proposal for Decision and classify Great Lakes Steel as two manufacturing locations for air surveillance fee purposes. Action on this matter was postponed until the Attorney General representative appears; however, the company representatives had to leave the meeting at this time.

Laro Coal and Iron Company, Saginaw

Laro Coal and Iron Company operated a metal chip dryer in Buena Vista Township. Mr. Benjamin White presented a staff report which indicated that the dryer is

in violation of the 0.1 particulate emission limit and that staff has received complaints of extremely heavy smoke and particulate emissions. In addition, the company has not agreed to enter into a consent order for installation of particulate control equipment, which was a condition of their Permit to Install No. 384-74. Therefore, the staff recommended that the Commission deny the company's operating permit and refer the matter to the Attorney General's office for possible legal action concerning past violations of the Commission's rules and permit conditions.

Laro Coal and Iron Company was represented by Mr. Mike Stafford, Attorney, and Mr. Peter Goodstein, President. Mr. Stafford protested the 0.1 particulate emission limit and requested a contested case hearing if the Commission denies the Permit to Operate.

There were six citizens from Buena Vista Township who spoke in opposition to Laro Coal and Iron Company: (1) Mr. Daryl Dauer, (2) Ms. Esther Ronk, (3) Ms. Judy Haske, (4) Mr. & Mrs. Wilbert Johnson, and (5) Mr. John Altschettel. They complained that the emissions were causing crop damages and that the heavy smoke emissions made it difficult to breathe. In addition, there were four representatives from the Buena Vista Township government: (1) Mr. James E. Leidlein, Township Manager; (2) Mr. Jerome P. Reif, Attorney; (3) Mr. Marvin E. Rethman, Building Inspector; and (4) Mr. Loren W. Allen, Captain of the Fire Department. Mr. Leidlein and Mr. Reif verified the citizen's complaints and stated that the company was a nonconforming use in accordance with the township's master zoning plan.

Minute 1440: Commissioner Quackenbush moved the Commission adopt the staff's recommendation to deny Permit to

Operate No. 384-74 and refer the matter of Laro Coal and Iron Company's violations to the Attorney General for appropriate legal action. The motion was supported by Commissioner Graves, all commissioners present voting therefor (8-0).

The Detroit Edison Company, Hancock Station, Oakland County

Commissioner Reicks abstained from participation in this agenda item.

Mr. Richard Johns reviewed the Detroit Edison Company's application to install oil firing equipment on an existing gas turbine generator at the Hancock Station. A public comment period had been announced on this permit application. The staff recommended the Commission approve the permit, provided there are no adverse comments received by December 30, 1977.

Minute 1441: Commissioner Klopp moved the Commission authorize the issuance of Permit to Install No. 120-77 to The Detroit Edison Company, provided there are no adverse comments received by December 30, 1977. The motion was supported by Commissioner Scherschligt, and passed unanimously (Voting yes: Commissioners Gilpin, Graves, Klopp, Quackenbush, Scherschligt, Shannon, and Acting Chairman Henry; Abstaining: Commissioner Reicks).

Commissioner Gilpin left the meeting at 5:00 p.m.

Traverse Corporation, Maple Grove Township, Manistee County

The staff announced a public comment period on an application from Traverse Corporation to install a gas sweetening facility in Maple Grove Township. Mr. Johns reviewed the staff report which recommended the Commission approve the permit, provided there are no adverse comments received by December 20, 1977. The company was represented by Mr. Ruben Essary.

Minute 1442: Commissioner Scherschligt moved the Commission authorize the issuance of Permit to Install No. 395-77 to Traverse Corporation, provided there are no adverse comments received by December 20, 1977. The motion was supported by Commissioner Quackenbush, all commissioners present voting therefor (7-0).

McClure Oil Company, Union Township, Grand Traverse County

McClure Oil Company requested a permit to restart operation of an existing gas sweetening facility in Union Township, and the staff announced a public comment period. In the report presented by Mr. Johns, the staff recommended approval of the permit, provided there are no adverse comments received by December 20, 1977.

Minute 1443: Commissioner Shannon moved the Commission authorize the issuance of Permit to Install No. 98-71A to McClure Oil Company, provided there are no adverse comments received by December 20, 1977. The motion was

supported by Commissioner Graves, all commissioners present voting therefor (7-0).

The staff announced that they had granted some waivers to begin installation without permits and that they would extend those waivers for one more month due to lack of time for Commission consideration at this time, and the Commission concurred.

Lansing Board of Water and Light

Commissioner Reicks abstained from participation in this agenda item.

On October 28, 1977, the Commission's staff notified the Lansing Board of Water and Light of an excursion and ordered them to submit a control strategy within 60 days for compliance with Tables 3 and 4 of Rule 336.49. At their meeting on November 22, 1977, the Commission tabled a motion in support of the staff's action, pending tests to be conducted on the monitor which recorded the excursion.

Mr. Dennis Drake reported that the staff conducted an extensive series of tests on the monitor in question to determine if temperature has an appreciable effect, and the staff concluded that an excursion did take place August 27 and 28, 1977.

Mr. Earl F. Brush, General Manager of the Lansing Board of Water and Light, stated he did not agree with the staff's conclusions and that they filed a petition on November 25 requesting a hearing before an independent hearings officer.

Minute 1444: Commissioner Shannon moved the Commission remove Minute 1415 from

the table, and Commissioner Klopp supported the motion.

Minute 1415: Commissioner Gilpin moved the Commission support staff's notification to the Lansing Board of Water and Light to proceed under the terms of Consent Order No. 11-1975 which requires the Board to submit a control strategy for sulfur dioxide by December 28, 1977. The motion ws supported by Commissioner Scherschligt. The Commission proceeded to vote on the motion, which passed unanimously (Voting yes: Commissioners Graves, Klopp, Quackenbush, Scherschligt, Shannon, and Acting Chairman Henry; Abstaining: Commissioner Reicks).

Mr. Brush asked if the Commission's action was denial of the request for a hearing, and the Commission and staff indicated that it was.

National Steel Corporation, Great Lakes Steel Division, Detroit

The Commission heard arguments from company representatives on the hearings examiner's Proposal for Decision earlier in the meeting and postponed action until the Attorney General representative arrived. Mr. Gary Gordon, Assistant Attorney General, submitted exceptions to the Proposal for Decision and stated that the Attorney General Department's position was that Great Lakes Steel should be declared three manufacturing locations for purposes of assessing surveillance fees.

Minute 1445: Commissioner Quackenbush moved the Commission concur with the findings of the hearings examiner and designate Great Lakes Steel Division's Zug Island power plant as one manufacturing location and the Zug Island and Ecorse-River Rouge facilities as the second manufacturing location. The motion was supported by Commissioner Shannon and passed by a vote of six to one (Voting yes: Commissioners Graves, Klopp, Quackenbush, Reicks, Shannon, and Acting Chairman Henry; Voting no: Commissioner Scherschligt).

The meeting adjourned at 5:35 p.m.

/s/ Philip L. Richards
Vice Chairman

Robert L. Henry, Jr.
Acting Chairman

/s/ Mary Ann Halbeison, Secretary

STATE OF MICHIGAN
WILLIAM G. MILLIKEN
DEPARTMENT OF NATURAL RESOURCES

December 30, 1977

Mr. George R. Alexander
Administrator, Region V
U. S. Environmental Protection Agency
230 South Dearborn Street
Chicago, Illinois 60604

Dear Mr. Alexander:

At their meeting of record held on December 20, 1977, the Michigan Air Pollution Control Commission conducted a public hearing on the proposed designation of areas which have and which have not attained federal ambient air quality standards.

Pursuant to Section 107(d) of the Clean Air Act, as amended, the Air Pollution Control Commission adopted, based on the public hearing record, the designations that were proposed at their meeting on November 22, 1977, with the following exceptions:

1) The entire State was declared attainment for sulfur dioxide.

2) A portion of Marquette, which was proposed as non-attainment for total suspended particulates, was declared as unclassifiable.

3) The boundary of the non-attainment area for carbon monoxide in the Detroit metropolitan area was modified to include all of the Cities of Fraser, Clawson, Royal Oak, Romulus, Wayne, Westland,

and Livonia; and the Cities of Bingham Farms and Beverly Hills were included in the attainment area.

We are enclosing a copy of all of the public statements made at the hearing record for your staff's consideration. We would be pleased to meet with your staff to discuss these designations prior to your formal proposal which is scheduled to be published on February 3, 1978. If you would like such a meeting or have other questions on these designations, please contact Del Rector at (517) 373-7573.

Very truly yours,

AIR POLLUTION CONTROL
COMMISSION

/s/ Lee E. Jager
Executive Secretary

LEJ:drh
Enclosure

Office-Supreme Court, U.S.
FILED
APR 13 1981
ALEXANDER L. STEVAS,
CLERK

80-1708

NO. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

THE DOW CHEMICAL COMPANY,
a Delaware corporation,
Petitioner,
vs.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
and DOUGLAS M. COSTLE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
(Supplemental Appendix "B")

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962-8745 962-8746

The following is a typeset reprint of Appendix "B" which appeared as a photostat, on pages 14 through 33, in the original Appendix to Petition for Writ of Certiorari filed on April 2, 1981.

APPENDIX "B"

EXCERPT FROM FEDERAL REGISTER

March 3, 1978 — Part II

[6560-01]

Title 40 — Protection of Environment

CHAPTER 1 — ENVIRONMENTAL PROTECTION AGENCY

SUBCHAPTER C — AIR PROGRAMS

[FRL 856-5]

PART 81 — AIR QUALITY CONTROL REGIONS, CRITERIA, AND CONTROL TECHNIQUES

Section 107 — Attainment Status Designations

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: This rulemaking sets forth the attainment status of all States in relation to the national ambient air quality standards (NAAQS). The tables following this rulemaking indicate, on a State-by-State, pollutant-by-pollutant basis, the attainment status of every area as submitted by the appropriate State agency and approved, or as designated by the Environmental Protection Agency (EPA). No distinctions are made as to the severity of the violations recorded in the areas designated as nonattainment in these tables. These designations are immediately effective. EPA is soliciting comments for 60 days and will republish revised designations as appropriate.

DATES: Effective Date: Immediately.
Comments Due: May 2, 1978.

ADDRESS: General comments on these designations should be addressed to Norman L. Dunfee, Chief Control Programs Operations Branch (MD-15), Office of Air Quality Planning and Standards (OAQPS), Research Triangle Park, N.C. 27711.

Comments relative to specific State designations should be directed to the appropriate EPA Regional Office, contact as listed below:

Tom Devine, Chief, Air Branch, EPA Region I, JFK Federal Building, Boston, Mass. 02203 (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont).

William Baker, Chief, Air Branch, EPA Region II, 26 Federal Plaza, New York, N.Y. 10007 (New York, New Jersey, Puerto Rico, Virgin Islands).

Howard Heim, Chief, Air Branch, EPA Region III, Curtis Building' Sixth and Walnut Streets, Philadelphia, Pa. 19106 (Delaware, Maryland, Pennsylvania, Virginia, West Virginia, District of Columbia).

Tom Helms, Chief, Air Branch, EPA Region IV, 345 Courtland Street NE., Atlanta, Ga. 30308 (Alabama, Georgia, Florida, Kentucky, Mississippi, North Carolina, Tennessee, South Carolina).

Jack Chicca, Chief, Air Branch, EPA Region V, 230 South Dearborn Street, Chicago, Ill. 60604 (Indiana, Illinois, Michigan, Minnesota, Ohio, Wisconsin).

Jack Divita, Chief, Air Branch, EPA Region VI, 1201 Elm Street, Dallas, Tex. 75270 (Arkansas, Louisiana, Oklahoma, New Mexico, Texas).

Art Spratlin, Chief, Air Branch, EPA Region VII, 1735 Baltimore Street, Kansas City, Mo. 64108 (Nebraska, Iowa, Kansas, Missouri).

Robert DeSpain, Chief, Air Branch, EPA Region VIII, 1860 Lincoln Street, Denver, Colo. 80295 (Montana, Utah, North Dakota, South Dakota, Wyoming, Colorado).

Allyn Davis, Chief, Air Branch, EPA Region IX, 215 Fremont Street, San Francisco, Calif. 94105 (California, Nevada, Arizona, Hawaii, American Samoa, Northern Mariana Islands).

Clark Gaulding, Chief, Air Branch, EPA Region X, 1200 Sixth Avenue, Seattle, Wash. 98101 (Alaska, Washington, Oregon, Idaho).

FOR FURTHER INFORMATION CONTACT:

Norman L. Dunfee, USEPA, Research Triangle Park, N.C. 27711, phone 629-5226 (FTS) or 919-541-5226 (commercial).

SUPPLEMENTARY INFORMATION:

The Clean Air Act (CAA) Amendments of 1977 place additional requirements on the States and EPA. Among them, the Amendments added section 107(d), which directed each State, within 120 days after the Amendments were enacted, to submit to the Administrator a list of the NAAQS attainment status of all areas within the State. The Administrator was required under section 107(d)(2) to promulgate the State lists, with any necessary modifications, within 60 days of their submittal.

The States are now preparing revisions to their State implementation plans (SIPs) as required by sections 110(a)(2)(I) and 172 of the Act. This enterprise, which

must be completed by January 1, 1979, requires that the States have immediate guidance as to the attainment status of the areas designated under section 107(d). Congress has acknowledged this by imposing a tight schedule on the designation process and requiring EPA to promulgate the list within 180 days of the enactment of the amendments. Under these circumstances it would be impracticable and contrary to the public interest to ignore the statutory schedule and postpone publishing these regulations until notice and comment can be effectuated. For this good cause, the Administrator has made these designations immediately effective.

The Agency recognizes, however, the importance of public involvement in the designation process. It is therefore, soliciting public comment on this rule by May 2, 1978.

Comments received will be considered carefully and revisions to the designations will be made where appropriate. The criteria used in making these designations include the following.

AIR QUALITY DATA

Section 107(d) of the CAA specified that designations should be based upon air quality levels as of enactment of the Amendments (August 7, 1977). States were required by EPA guidance to consider the most recent four quarters of monitored ambient air quality data available. If this data showed no standards violations, then the previous four quarters of monitoring data were to be examined to assure that the current indication of attainment was not the result of a single year's data reflecting unrepresentative meteorological conditions. In the absence of sufficient monitored air quality data, other evaluation methods were used, including air quality dispersion modeling.

GEOGRAPHIC SIZE

The Act specified that the designation areas could be based on air quality control regions (AQCRs) or any subportions of these areas. EPA advised States they could divide AQCRs into various nonattainment, attainment, or unclassified portions, i.e., county, subcounty, or other geographic areas as long as the area could be clearly defined in a written narrative. Additionally, a different geographic area could be used in designating the status for each pollutant.

POLLUTANT SPECIFIC CONSIDERATIONS

Subsections 107(d)(1) (A)-(E) of the CAA Amendments specified the possible categories for area designations. For both total suspended particulates (TSP) and sulfur dioxide (SO_2), an area could be designated as: (1) Not meeting the primary NAAQS, (2) not meeting the secondary NAAQS, (3) unclassifiable, and (4) attainment. For carbon monoxide (CO), photochemical O_x, and nitrogen dioxide (NO_2), designations of: (1) Not meeting the primary NAAQS, and (2) attainment/ unclassified were possible. The attainment and unclassified designations for CO/O_x/NO_2 are combined into one column for the tables presented in this notice because both designations are set forth by subsection 107(d)(1)(E) of the CAA. No designations regarding the secondary NAAQS for these pollutants were necessary since the primary standards and secondary standards are identical.

The criteria used in designation of the status of each pollutant used in addition to ambient air quality data is discussed below:

PHOTOCHEMICAL OXIDANTS

There are 105 urban areas in the United States with populations greater than 200,000. These major urban areas (except Honolulu, Hawaii, and Spokane, Wash.)

are where the oxidant problem is most severe. Honolulu has recorded eight consecutive quarters of data without a violations justifying and attainment designation. There is sufficient uncertainty regarding conditions in Spokane to warrant an unclassifiable designation for the present time. The other 103 urban areas, where over 100,000,000 people reside, consistently experience photochemical oxidant levals above the NAAQS. Due to these factors, higher priority is being given in the SIP planning process to these urban areas. Of these, only six urban areas do not have oxidant ambient air quality monitoring data. The other 97 urban areas experienced oxidant violations based on ambient data. Since 97 of the 105 urban areas greater than 200,000 with monitoring data recorded violations, the six cities without data were presumed to be nonattainment for oxidants.

Additionally, a comprehensive analysis was performed by OAQPS and other factors considered by EPA for each of the six urban areas. These analyses substantiated the presumptive nonattainment designation and these areas will be required to monitor during the 1978 oxidant season (summer-fall) to determine the magnitude of their oxidant problem.

TOTAL SUSPENDED PARTICULATES

Given the spatially limited nature of TSP violations, no general area size criteria were possible. However, States were advised that designations along political boundaries such as city limits or county lines were practical from an air quality management standpoint.

The problem of designating for rural fugitive dust areas required special consideration. EPA's fugitive dust policy recognizes the generally greater health impact due to fugitive dust in urban areas in contrast to rural areas.

In urban areas, the windblown soil contains various manmade toxic pollutants. But, rural windblown dust is usually not significantly contaminated by industrial pollutants. Therefore, for the purposes of these designations, any rural areas experiencing TSP violations which could be attributed to fugitive dust could claim attainment of the TSP NAAQS. Rural areas for this purpose are defined as those which have: (1) A lack of major industrial development or the absence of significant industrial particulate emissions, and (2) low urbanized population densities.

CARBON MONOXIDE

A designation of nonattainment for the entire urban core area of a city experiencing monitored CO violations was desirable, but smaller area designations were acceptable since CO violations are most pervasive in downtown areas of high traffic density.

SULFUR DIOXIDE AND NITROGEN DIOXIDE

Generally where EPA promulgated a designation for SO_2, the minimum area was to be the county in which the violating monitoring site was located. If States had monitoring data to substantiate the size areas they designated, they would be acceptable by EPA regardless of size.

AIR QUALITY CONTROL REGION (AQCR) REDESIGNATIONS

Section 107 of the CAA also provided for redesignation of the existing AQCR boundaries where a State determined that the redesignated areas would promote more efficient air quality management. Several States exercised this option in defining their designation areas.

Part 81 under Title 40 of the Code of Federal Regulations presently contains descriptions of all existing AQCRs and these descriptions, where feasible, will be modified in a future FEDERAL REGISTER notice to reflect the State revisions. The exact descriptions of all AQCR boundaries are available from either the appropriate State or EPA Regional Office.

EFFECT OF THE DESIGNATIONS

Section 107(d)(1)(A)-(E) sets out attainment status categories to which reference is made in Parts C (Prevention of Significant Deterioration (PSD)) and D (Nonattainment) of the CAA. Section 171(2) in Part D defines "nonattainment area" to include any area identified under subparagraphs 107(d)(1) (A)-(C), while giving the Administrator authority to add other areas based on monitoring or calculations. Similarly, areas designated under subparagraphs 107(d)(1) (D) or (E) are described in section 161, Part C, as PSD areas.

The section 107(d) designations are meant to provide a starting point for States in their efforts to correct existing air quality problems and to implement programs under the 1977 CAA Amendments. For example, a designation as a nonattainment area, in general, means that an applicable SIP must be revised, pursuant to section 172, to provide for attainment of the NAAQS as expeditiously as practicable, but not later than December 31, 1982 (December 31, 1987, under certain conditions for photochemical oxidants and/or carbon monoxide.) Under section 172(b)(6) the revised SIPs must require permits, in accordance with the provisions of section 173, for the construction and operation of major new or modified stationary sources. To be approved by the Administrator under section 110(a)(2)(I), a SIP must contain a

prohibition against major new source construction in nonattainment areas after June 30, 1979, where emissions from the source would contribute to increases in pollutants for which a NAAQS was being exceeded, unless the SIP meets the requirements of Part D at the time of the permit application. Under section 129 of the Amendments, EPA's emission offsets policy, as modified, continues to apply to major new source construction in nonattainment areas prior to July 1, 1979.

But the designation of an area as nonattainment or attainment must be considered only a point of departure and not a final, inflexible end in itself. The designations will have only limited significance for new source preconstruction review, for three reasons. First, new sources, wherever they propose to locate, must be reviewed for their impact on all nearby areas as well as that in which they would locate. If an area on which a new source would impact is designated differently than the one in which it is locating, the designation of the latter would not necessarily determine the rules to which the source would be subject. Second, PSD rules apply in any area where at least one NAAQS is attained, and since virtually every area in the country shows attainment for at least one pollutant, the PSD review will be a requisite virtually everywhere. Finally, case-by-case new source review is necessitated to account for the possibility that an area with a particular designation may encompass "pockets" which do not fit that designation.

These section 107(d) designations are subject to revision under Section 107(d)(5) whenever sufficient data is available to warrant a redesignation. Both the State and EPA can initiate changes to these designations, but any State redesignation must be submitted to EPA for concurrence. EPA will promulgate any revised list in

accordance with the requirements for this initial promulgation.

EPA REVIEW

The State submittals were reviewed by EPA for consistency with the criteria set forth in this notice. Where EPA differed with a State designation, section 107 of the CAA provides that EPA should notify the State and allow the submission of additional information. If EPA and the State could not reach agreement, an EPA designation would replace the State submitted designation. Also, in the case where a State failed to designate for any State or portion thereof the EPA would designate for the State as needed.

EPA considered all available monitoring data where it was determined to be valid. All EPA designations contained in the following tables were made within the criteria contained in this notice except in a limited number of cases where the State designations were replaced by unclassifiable designations by the appropriate Regional Offices on the basis that a major source in each county was utilizing a possibly unauthorized dispersion technique. Since EPA has not finalized its tall stack policy regulations to implement Section 123, it is presently unknown whether the sources can claim full credit for their existing stacks.

EPA designations are indicated in the following tables by the asterisks accompanying the designations: * means a Federal EPA designation replaced a State recommendation. This * is used where either the designation status or the area size was modified by EPA: ** means solely a Federal designation where a State failed to submit their own recommendation. In some instances, the descriptions of the designated areas submitted by the

States were so lengthy as to prohibit their publication in the limited space available in the tables presented below. Exact descriptions of all areas designated are available at the appropriate Regional Offices or the State in question. In some of the following tables, States referenced AQCRs by their appropriate number instead of their title. An Appendix A is included in the regulatory section of this rulemaking which gives both the AQCR name and number for ease of reference.

A summary of the approved designations for the 3215 counties or county equivalents covered by these designations is presented below:

	TSP	SO_2	CO	O_x	NC_2
Number of counties either totally or partially approved or designated by EPA as nonattainment	421	101	190	607	8

Dated: February 23, 1978.

DOUGLAS M. COSTLE,
Administrator.

Part 81 of Chapter I, Title 40 of the Code of Federal Regulations is amended by adding Subpart C and Appendix A as follows:

Subpart C — Section 107 Attainment Status Designations

Sec.
81.300 Scope.
81.301 Alabama.
81.302 Alaska.
81.303 Arizona.
81.304 Arkansas.
81.305 California.
81.306 Colorado.

Sec.
81.307 Connecticut.
81.308 Delaware.
81.309 District of Columbia.
81.310 Florida.
81.311 Georgia.
81.312 Hawaii.
81.313 Idaho.
81.314 Illinois.
81.315 Indiana.
81.316 Iowa.
81.317 Kansas.
81.318 Kentucky.
81.319 Louisiana.
81.320 Maine.
81.321 Maryland.
81.322 Massachusetts.
81.323 Michigan.
81.324 Minnesota.
81.325 Mississippi.
81.326 Missouri.

Sec.

81.327 Montana.
81.328 Nebraska.
81.329 Nevada.
81.330 New Hampshire.
81.331 New Jersey.
81.332 New Mexico.
81.333 New York.
81.334 North Carolina.
81.335 North Dakota.
81.336 Ohio.
81.337 Oklahoma.
81.338 Oregon.
81.339 Pennsylvania.
81.340 Rhode Island.
81.341 South Carolina.
81.342 South Dakota.
81.343 Tennessee.
81.344 Texas.
81.345 Utah.
81.346 Vermont.
81.347 Virginia.
81.348 Washington.
81.349 West Virginia.
81.350 Wisconsin.
81.351 Wyoming.
81.352 American Samoa.
81.353 Guam.
81.354 Northern Mariana Islands.
81.355 Puerto Rico.
81.356 U.S. Virgin Islands.

APPENDIX A — Air Quality Control Regions (AQCR's).

AUTHORITY: Secs. 107, 301, of the Clean Air Act, as amended (42 U.S.C. 7407, 7601).

Subpart C — Section 107 Attainment Status Designations

§ 81.300 Scope.

Attainment status designations as approved or designated by the Environmental Protection Agency (EPA) pursuant to Section 107 of the Act are listed in this subpart. Area designations are subject to revision whenever sufficient data becomes available to warrant a redesignation. Both the State and EPA can initiate changes to these designations, but any State redesignation must be submitted to EPA for concurrence.

§ 81.323 Michigan

Michigan — TSP

Designated Area	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Cannot Be Classified	Better Than National Standards
AQCR 82 (Michigan Portion) Except sub-areas defined by range and township numbers:				X
1. Berrien County R18W, T4S, Sections 7, 8, 17-20, 29, 30 R19W, T4S, Sections 12-14 & 23-27		X		
AQCR 122 Except sub-areas defined:				X
1. Bay County R5E, T14N, Sections 14-16 & 21-23		X		
2. Genesee County a. Starting at intersection of Stewart Av. and N. Saginaw St. then E. along Stewart Av. to Dort Highway to Franklin Av. to Hamilton Av. to Saginaw St. to Stewart Av.	X*			
b. Starting at intersection of Carpenter Rd. and DuPont St. then E. on Carpenter Rd. to Center Rd. then S. to M-21 then E. to I-475 to Bristol Rd. then W. to I-75 then N. to Corunna Rd. (M-56) then E. to Flint city limits then N. to Pasadena Av. then E. to DuPont St. to Carpenter Rd.		X*		

*EPA designation replaces State designation

Michigan — TSP (continued)

Designated Area	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Cannot Be Classified	Better Than National Standards
3. Kent County R11W, T7N, Sections 19, 30, 31 R12W, T7N, Sections 22-27 & 34-36		X		
4. Mason County R18W, T18N, Sections 13,14, 23 & 24		X		
5. Midland County R2E, T14N, Sections 13-15, 21-23, 26-28 & 33-35		X		
6. Muskegon County R16W. T9N. Sections 21, 22 & 27-34		X		
7. Saginaw County a. R4E, T21N, Sections 1, 12-15, 22-27 & 34-36 R5E, T12N, Sections 4-6, 9, 16, 19-21 & 28-33		X		
b. R5E, T12N, Sections 7, 8, 17 & 18	X			
AQCR 123 Except sub-areas defined:				X
1. Macomb County a. R14E, T4N, Sections 247, 28, 33, & 34		X		
b. All of County South of 20 Mile Rd.		X		

Michigan — TSP (continued)

Designated Area	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Cannot Be Classified	Better Than National Standards
2. Oakland County a. R10E, T3N, Sections 15, 16, 21, 22, 27 & 28		X		
b. Area included within: Coolidge Rd. 10 Mile Rd. Campbell Rd. 14 Mile Rd. Dequindre Rd. & 8 Mile Rd.		X		
3. St. Clair County R17E, T6N, Sections 2-4 9-11, 14-16, 21 22 & 28		X		
4. Wayne County a. Area included within: Lake St. Clair 8 mile Rd. to Schaeffer Rd. to McNichols Rd. to Greenfield Av. to Evergreen Rd. to Joy Rd. to Telegraph Rd. to Ford Rd., to Beech-Daly Rd. to Cherry Hill Rd. to Inkster Rd. to Carlysle St. to Middle Belt Rd. to Van Born Rd. to Wayne Rd. to Ecorse Rd. to Haggerty Hwy. to Tyler Rd. to Belleville Rd. to I-94 to Rawsonville to Oakville — Waltz Rd. to Will — Carlton Rd. to the Huron River to Lake area except for the subarea under b.		X		

Michigan — TSP (continued)

Designated Area	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Cannot Be Classified	Better Than National Standards
b. Area included within: Lake St. Clair-Moross Rd. to 7 Mile Rd. to Van Dyke Rd. to 8 Mile Rd. to Wyoming Rd. to 7 Mile Rd. to Schaffer Rd. to Fenkell Rd. to Greenfield Av. to Joy Rd. to Southfield Expressway to Ford Rd. to Cherry Hill Rd. to Beech-Daly Rd. to Michigan Av. to Inkster Rd. to Carlysle St. to Middle Belt Rd. to Sibley Rd. to Telegraph Rd. to King Rd. to Grange Rd. to Sibley Rd. to Jefferson Av. to Bridge St. (Gross Ile) extended to Detroit River)	X			
AQCR 124 (Michigan Portion) Except sub-area defined by following townships:				X
1. Monroe County Exeter, Ash, Berlin, Raisinville, Monroe & Frenchtown Townships including all incorporated municipalities		X		
AQCR 125				
Except sub-areas defined:				X
1. Branch County R6W. T6S, Section 22		X		
2. Calhoun County R4W, T25, Section 34	X			
3. Ingham County R2W; T4N, Sections 2-11 & 14-23		X		

Michigan — TSP (continued)

Designated Area	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Cannot Be Classified	Better Than National Standards
4. Washtenaw County Area near Ypsilanti within Cross St., Huron St., Harris Rd. & I-94		X		
AQCR 126				X
1. Delta County R22W, T39N, Sections 6-8, 17-20, 29-30				
R23W, T39N Sections 1, 12 & 13		X		
2. Emmet County R6W, T34N Sections 1-3 & 9-12				
3. Manistee County R16W, T21N Sections 7, 18 & 19		X		
R17W, T21N, Section 12 & 13		X		
4. Marquette County R25W, T48N Section 1 & 2			X	

Michigan — SO_2

Designated Area	Does Not Meet Primary Standards	Does Not Meet Secondary Standards	Cannot Be Classified	Better Than National Standards
AQCR 82 (Michigan portion)				X
AQCR 122				
Except sub-areas defined				X
1. Ingham County	X*			
2. Midland County	X*			
AQCR 123				X
AQCR 124 (Michigan portion)				X
AQCR 125				X
AQCR 126				X

*EPA designation replaces State designation

Michigan O_x

Designated Area	Does Not Meet Primary Standards	Cannot Be Classified or Better Than National Standards
AQCR 82 (Michigan portion)	X	
AQCR 122		
Except sub-area defined:		X
1. Muskegon, Ottawa, Allegan, Kent, Montcalm, Ionia, Gratiot, Midland, Bay, Saginaw, Shiawasee, Genesse, Tuscola, Lapeer, Sanilac and Huron Counties	X	
AQCR 123	X	
AQCR 124 (Michigan portion)	X	
AQCR 125	X	
AQCR 126		
Except sub-area defined:		X
1. Marquette County	X*	

*EPA designations replace State designations

Michigan — CO

Designated Area	Does Not Meet Primary Standards	Cannot Be Classified or Better Than National Standards
AQCR 82 (Michigan portion)		X
AQCR 122		
Except sub-area defined:		X
1. Saginaw County R4E, T12N Sections 1, 12, 13 & 24 R5E, T12N Sections 4-9, 16-21	X	
AQCR 123		
Except sub-area defined:		X
1. Macomb, Oakland, Wayne Counties Lake St. Clair — 14 Mile Rd. to Kelly Rd. N. to 15 Mile Rd. to Hayes Rd. S. to 14 Mile Rd. to Clawson northern city boundary to Royal Oak northern city boundary to 13 Mile Rd. to Evergreen Rd. to Beverly Hills southern city boundary to Bingham Farms southern city boundary to Franklin southern city boundary to Inkster Rd. to 8 Mile Rd. to Livonia western city boundary to Wayne western city boundary to Romulus southern city boundary following Pennsylvania Rd. to Detroit River.	X	
AQCR 124 Michigan portion		X
AQCR 125		X
AQCR 126		X

Michigan — NO_2

Designated Area	Does Not Meet Primary Standards	Cannot Be Classified or Better Than National Standards
State of Michigan		X

EXCERPT FROM FEDERAL REGISTER

March 26, 1980

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52
[FRL 1445-7]

Approval and Promulgation of Implementation Plans; Disapproval of Proposed Revision to Michigan Plan

AGENCY: Environmental Protection Agency.

ACTION: Disapproval of proposed revision.

SUMMARY: This action disapproves a proposed revision to the Michigan State Implementation Plan (SIP) submitted to the U.S. Environmental Protection Agency (USEPA) by the Michigan Department of Natural Resources (MDNR) pursuant to Section 110(a)(3) of the Clean Air Act, 42 U.S.C. 7410(a)(3). The revision, in the form of a Final Order issued February 13, 1979 by the Michigan Air Pollution Control Commission (MAPCC), proposed to extend the compliance date to December 31, 1982 for Dow Chemical Company (Dow) of Midland, Michigan to meet the State emission limits for the sulfur dioxide, particulate matter, and visual emissions. In order to control emissions before December 31, 1982 the Order permitted Dow to utilize a Supplementary Control System (SCS).

FOR FURTHER INFORMATION CONTACT: Gary Gulezian, Acting Chief, Regulatory Analysis Section, Air Programs Branch, United States Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 60604 (312) 886-6053.

SUPPLEMENTARY INFORMATION:

I. Background

On February 14, 1979 the Michigan Air Pollution Control Commission (MAPCC) submitted to USEPA a proposed revision to Michigan's State Implementation Plan (SIP). The revision was in the form of a Final Order issued by MAPCC after Dow and the MDNR had entered into a Stipulation for Entry of a Consent Order.

In the Consent Order Dow acknowledged "that it is presently the source of the emissions which result in all significant ambient air concentrations of sulfur dioxide in and around Midland, Michigan," and agreed with the MAPCC that "Federal Ambient Air Quality Standards for sulfur dioxide are presently being met in and around Midland, Michigan, because of the operation of an SCR [Supplementary or Intermittent Control System] by Dow." Supplementary or Intermittent Control Systems are described in the Order as "systems which limit the rate of pollutant emissions during periods when meteorological conditions conducive to ambient ground level concentrations in excess of levels specified in subparagraph (iii) are anticipated." The ambient ground level concentrations specified in subparagraph (iii) are the same as the National Ambient Air Quality Standards (NAAQS) for sulfur dioxide (a running 24-hour average of 0.14 ppm, an annual arithmetic mean of 0.03 ppm, and a running 3-hour average of 0.50 ppm) with the exception that no exceedances are allowed. In order to keep from exceeding these concentrations, subparagraph (iii) of the Order provides further that "Dow shall utilize low sulfur fuel, load reduction, plant shut down, or other measures **

The Order provided that by December 31, 1982, Dow would be in continuous compliance with the present State emission standards through the purchase of process steam and electricity or by burning fuel which would result in compliance; but, until that time Dow would be exempt from the State emission limitations for sulfur dioxide, particulates and opacity.

At the present time the federally-approved Michigan Implementation Plan provides that Dow achieve compliance with sulfur dioxide emission standards by July 1, 1975, and with particulate emission standards by April 1, 1975. See 40 CFR 52.1175(d).

On May 17, 1974 Dow and MAPCC entered into a Consent Order which provided that Dow could temporarily operate a SCS until July 1, 1980, to meet NAAQS for sulfur dioxide; that, until July 1, 1980, Dow was exempt from the State emission limitations for sulfur dioxide (SO_2) and, that Dow would, in the interim, purchase and install equipment on its coal-fired boilers so as to enable Dow to shift the use of fuels from coal to oil or natural gas when it was determined through the use of its SCS that the weather was conducive to ground level concentrations in excess of NAAQS. This Consent Order was never submitted to USEPA as a SIP revision.

On July 21, 1977, Dow and MAPCC entered into a new Consent Order. This Order authorized Dow to continue operation of its existing system (switching from coal to oil or gas when meteorological conditions conducive to ground level concentrations in excess of NAAQS exist) until July 1, 1980, at which time Dow agreed to eliminate coal as a fuel in its power plants and substitute compliance fuels, primiarly oil.[1] The 1977 Consent Order was the subject of litigation (*Dow Chemical v. Costle*, No. 78-10019, E.D. Mich.), wherein the District Court

determined that the review of the Consent Order as a proposed SIP revision by USEPA could not be accomplished until the MAPCC had completed the record and submitted it to USEPA for review. Instead of completing the record for the 1977 Consent Order, Dow and the MAPCC entered into negotiations for a new Consent Order and on February 14, 1979 Consent Order APC No. 01-1979 was formally submitted by MAPCC to USEPA as a proposed SIP revision.

In August 1977, Congress amended the Clean Air Act (Act) to require the designation of areas in each state where the National Ambient Air Quality Standards (NAAQS) for total suspended particulates (TSP), sulfur dioxide (SO_2), carbon monoxide (CO), photochemical oxidents (ozone), and nitrogen dioxide (NO_2) were not being met. See Section 107(d) of the Act, 42 U.S.C. § 7407. An area in Midland County, Michigan, where Dow is located, was designated as a nonattainment area for both the primary and secondary SO_2 NAAQS and for the secondary TSP NAAQS. See 43 FR 8692, dated March 3, 1978, and 43 FR 45993 dated October 5, 1978. Thereafter, the State of Michigan submitted its part D implementation plan to attain and maintain sulfur dioxide and particulate NAAQS in the nonattainment areas. In its submittal the State indicated that its part D control strategy for SO_2 nonattainment areas was to eliminate supplemental control systems and to require "constant emission control systems." [2] This was to be accomplished by Consent Orders, such as APC No. 01-1979 previously submitted February 14, 1979, to USEPA as a proposed SIP revision. USEPA's review of

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[1] Comments by the Dow Chemical Company, August 2, 1979, p. 6.

Order No. 01-1979 as a part D SIP review is the subject of a separate notice of proposed rulemaking published 45 FR 9752 (February 13, 1980).

On June 19, 1979 USEPA published at 44 FR 35263 a Proposed Disapproval of the proposed site specific SIP revision on the basis that the Consent Order did not contain constant control devices for the continuous reduction of emissions but, instead, permitted Dow to vary its emissions of sulfur dioxide and particulates according to atmospheric conditions.

II. Public Comments

In response to the proposed disapproval of the proposed SIP revision comments were received from Dow Chemical Company and from the American Lung Association of Michigan. Dow's comments urged approval of the proposed SIP revision and made the following arguments:

1. The proposed revision is approvable because it meets the requirements of Sections 110(a)(2) and Sections 302(k) and (m) of the Clean Air Act.

2. In the event that Dow's system is determined to be a SCS and barred by Section 123 of the Act as a final means of compliance, Section 123 does not bar the use of the SCS as an interim means of compliance.

3. The designation of the Midland, Michigan area as a nonattainment area for sulfur dioxide and particulate NAAQS is in error.

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[2] State of Michigan Air Quality Implementation Plan dated May 1, 1979, p. 5-2.

4. The proposed revision should be approved because of equitable considerations.

5. Since the supplementary control system enables Dow to keep from violating NAAQS, "no significant health effects would be presented by controlling Dow-Midland sulfur dioxide emissions below the SCS level."[3]

The comments of the American Lung Association of Michigan supported disapproval of the Consent Order as a SIP revision and stressed the following points:

(1) The Order is contrary to law in that it permits reliance on a SCS for control of emissions from the Dow-Midland complex.

(2) The period during which Dow is permitted to use the SCS to control emissions does not qualify as an interim period under the Clean Air Act or case law.

(3) The Consent Order does not satisfy the SIP requirements of Section 172 of the Clean Air Act for nonattainment areas.

(4) The Consent Order does not provide for adequate emission monitoring for enforcement purposes.

(5) It would be inequitable to approve the Consent Order as a SIP revision.

As set forth below, the comments of Dow do not justify approval of the Consent Order as a SIP revision.

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[3] Health and Welfare Benefits of Continuous Control of Sulfur Dioxide emissions, prepared for Dow Chemical Co., November 17, 1978.

1. Requirements of Section 110(a)(3)(A) and Sections 302(k) and 302(m) of the Clean Air Act

A. Section 110(a)(3)(A) of the Clean Air Act provides for approval of SIP revisions by the Administrator if the revision "meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings." Paragraph (2) refers to Section 110(a)(2) which requires in subparagraph (B) that the revision contain "emission limitations * * * and such other measures as may be necessary to insure attainment of such primary or secondary standard * * * ." Section 302(k) defines "emission limitation" and "emission standard" as "a requirement * * * which limits the quantity, rate or concentration of emissions of air pollutants on a continuous basis * * * ," and Section 302(m) defines "means of emission limitation" as "a system of continuous emission reduction (including the use of specific technology or fuels with specified pollution characteristics)."

Although Dow and the MAPCC continuously refer to Dow's means of emission limitation as a Supplementary Control System,[4] Dow claims in its comments that Dow's system is not a SCS and that the Consent Order contains a proper "emission limitation" in that it establishes a "concentration" of pollutant which Dow is required to achieve. The "emission limitation," and/or "concentration," in the Consent Order are the primary and secondary National Ambient Air Quality Standards for sulfur dioxide with the exception that any exceedance of the Standards is considered a violation. Dow comments further that its system is not a SCS because it reduces emissions and insures continuous compliance with the NAAQS numerical limitations.[5]

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[4] Consent Order APC No. 1-1979 and Dow's Comments dated August 2, 1979.

Dow describes its SCS as a process by which information from eight SO_2 analyzers located in the City of Midland, from meteorological instruments in a tower located near the company, and from its boiler operation are fed into a computer which provides data to a consultant in Boston. The consultant uses this information to forecast the air quality impact of Dow's planned boiler operations. When the consultant determines which fuel must be burned in order to maintain NAAQS under the meteorological conditions in Midland, the information is sent back to the Dow computer for transmission to the Dow Utilities Control Room. The individuals in charge of the boiler operations then switch certain boilers to the fuel necessary to maintain NAAQS. Dow, in its comments stressed the ability of its SCS to keep Dow from violating NAAQS and alleged that because of this effectiveness Dow's SCS was not the type of SCS that Congress intended to ban by adding Section 123 of the Clean Air Act.

The Act requires more than continuous compliance with the NAAQS. Section 110(a)(2)(B) requires the use of emission limitations to insure attainment and maintenance of the NAAQS. Emission limitation, as defined in Section 302(k) and 302(m) of the Act requires "continuous emission reduction." Under Section 123 of the Act the degree of emission limitation required to meet the standards cannot be affected by a dispersion technique.

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[5] The concentration levels in the Consent Order will be referred to as to NAAQS hereafter for purposes of brevity although it is understood that the difference between the requirements in the Consent Orders and NAAQS is that the Consent Order states that any exceedance of the 24-hour standard is a violation, whereas NAAQS permit one exceedance of the 24-hour and 3-hour standards before the exceedances are considered a violation.

It is USEPA's determination, that Dow's system does not require continuous emission reduction and that it is designed so as to allow Dow to vary the fuel mix used by its boilers to the extent that it is necessary to keep from exceeding NAAQS.[6]

Such a system is a "dispersion technique"as described in Section 123 of the Act, i.e., "any intermittent or supplemental control of air pollutants varying with atmospheric conditions," and thus cannot be considered in determining the degree of emission limitation that Dow is required to meet. Furthermore, the Consent Order states that "Dow and the Commission agree that Federal Ambient Air Quality Standards are being met in and around Midland, Michigan, because of operation of an SCS by Dow."

Dow comments that the use of fuels may be a means of emission limitation. For the use of fuels, however, to be a proper means of compliance, the proposed SIP revision must identify the specific fuel mix to be used and include a demonstration that use of specific fuels at maximum operating conditions and "worst case" meteorology would not cause a violation of the NAAQS for either sulfur dioxide or particulates.

The proposed SIP revision that MAPCC has submitted to USEPA for approval/disapproval is deficient in that it contains no demonstration that the sulfur dioxide and particulate NAAQS would be protected without the use of Dow's SCS, a "dispersion technique."

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[6] See Dow's comments (July 20, 1979, p. 6) "This mixture of fuel varies as the concentration of the pollutant varies so that at no time is the limitation [SO_2 NAAQS] violated."

B. Dow comments that the proposed revision contains a proper emission limitation because Dow cannot exceed the SO_2 NAAQS. Dow claims this limitation [NAAQS] is a "concentration" of pollutant which Dow is required to achieve and thus is an "emission limitation" which meets the requirements of Sections 110(a)(2) and 302(k) of the Act. It is USEPA's position that the Clean Air Act not only requires compliance with the national ambient air quality standards, which are ground level concentrations, but also with emission limitations, which limit the amount of pollutants emitted by a source (42 U.S.C. 7410(a)(2) (A) and (B). Emission limitations, as applied to a source, must "assure continuous emission reduction" 42 U.S.C. 7602(k) and (m). Dow is required to comply with both ground level concentrations (ambient standards) and emission limitations designed to attain the ambient standards. Compliance by Dow with ground level concentrations of the SO_2 NAAQS does not constitute compliance with its emission limitation in the federally approved SIP. The Order which requires only compliance with the ground level concentrations of the SO_2 NAAQS does not meet the statutory requirements of Section 110(a)(2)(B) (42 U.S.C. 7410(a)(2)(B)).

The proposed revision is also deficient in that it does not contain any emission limitations for particulates or visual emissions.

2. *Interim Use of Supplementary Control Systems*

Dow comments on page 3 of its July 20, 1979 counsel's letter to USEPA that "Regardless, therefore, of whether the System is continuous means of emission control, EPA should permit the use of it in the interim"; and that nothing in the Clean Air Act nor case law prohibits the use of SCS on an interim basis. In support of its position

Dow cites several cases decided prior to the 1977 Amendments. Congress was aware of those cases when it passed the 1977 Amendments and chose to narrow substantially the circumstances where dispersion techniques were permissible.

USEPA has stated that "apart from the limited circumstances of sections 113(d) and 119, and the narrow exceptions of Section 123, dispersion technology cannot be employed in lieu of constant controls for any purpose under the Act." See 1977 Clean Air Act Amendments for Stack Heights, Notice of Proposed Rulemaking 44 FR 2608, January 12, 1979. It is USEPA's position that Congress, in the 1977 Amendments to the Act, permitted interim use of a SCS only as part of a Section 113(d) delayed compliance order or a primary nonferous smelter order under Section 119. Sections 113(d) and 119, 42 U.S.C. 7413(d), and 7419. American Lung in its comments agrees with USEPA's position.

3. Nonattainment Designation and Requirements of Part D of the Act

Dow maintains that the area in which its plant is located in Midland, Michigan, is an attainment area for NAAQS because of monitoring data recorded while Dow was using its SCS. USEPA has designated the area as a nonattainment area because Dow has failed to comply with its required emission limitations. Dow's reliance on SCS to avoid ambient standard violations is an impermissible way to attain national standards. See Sections 110(a)(2)(B), 123(a) and 302(k) and (m).

American Lung's comments stressed disapproval of Dow's Order No. 01-1979 under Part D of the Act. USEPA agrees and has proposed disapproval of the Order for failure to meet Part D requirements in a Notice

of Proposed Rulemaking published February 13, 1980 (45 FR 9752).

American Lung's comments, which pertain to the requirements of Part D, and other comments received in response to the proposed disapproval under Part D will be considered in USEPA's final rulemaking on that proposed disapproval.

4. *Equitable Considerations*

Dow stresses that USEPA's position is inequitable in that Dow is being penalized for its use of less than "Good Engineering Practice" stacks; that USEPA's disapproval will not result in any improvement in the public health and welfare in the public area; and that it would waste a critical national resource.

Dow's policy has been to rely on the possibility of purchasing process steam from a nuclear plant to be constructed by Consumers Power Company near Dow's Midland, Michigan industrial facilities. The nuclear facility was to have been operational by 1974-1975. When it became obvious that this operational date was not possible Dow sought to extend its compliance date for meeting the sulfur dioxide and particulate emission limits in the Michigan State Implementation Plan through Stipulation and Entry of Consent Orders with the MAPCC, which Consent Orders permitted Dow to attain and maintain NAAQS thorugh the use of a SCS. These Consent Orders were not submitted to USEPA as SIP revisions. Dow has insisted on this approach even though it has been informed by both the MAPCC and

USEPA that operation of a SCS in lieu of continuous emission controls was not an acceptable means of emission control.[7]

In the July 21, 1977 Consent Order, Dow agreed to achieve compliance by July 1, 1980 with the State emission limits for particulate matter, opacity, and sulfur dioxide. Compliance was to have been achieved through the use of compliance fuels. In this Order Dow did not make any claim that it was economically infeasible to achieve compliance by switching to compliance fuels in 1980. Instead of taking steps which would enable Dow to achieve final compliance by switching to compliance fuels in 1980, the Company negotiated further Consent Orders, the last of which extended the compliance date to December 31, 1982. Instead of implementing its SCS, Dow could have chosen other means of compliance in the early 1970's when it became apparent that the start up of the nuclear plant was beyond Dow's control. Dow can still select other means of compliance which meet the requirements of the Clean Air Act, i.e., continuous emission reduction.

Dow claims that it is inequitable for USEPA to expect Dow to comply with the requirements of the Clean Air Act. The Act does not empower USEPA to consider equities in fulfilling its statutory mandate. The Act provides that USEPA is to approve a SIP revision if, among other things, it contains a demonstration that NAAQS, both primary and secondary, will be attained and maintained through emission limitations. Such a demonstration must be made by approved modeling or

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[7] 41 FR 7450, Stack Height Increase Guildlines issued February 18, 1976; Notice of Violation EPA-5-77-A-13 issued November 18, 1976 by James O. McDonald, Director of Enforcement, Region V, USEPA; Answer of MAPCC to Dow's Complaint filed in *Dow Chemical Co. v. Reizen, et al.*, Michigan Court of Appeals No. 77-4792, United States District Court, Western District of Michigan, Southern Division (December, 1977), and USEPA correspondence with Dow in 1977.

monitoring techniques which cannot be affected by any dispersion techniques as defined by Section 123 of the Act. The February 14, 1979, Consent Order submitted as a proposed SIP revision does not contain this demonstration. Because the proposed revision permits Dow to use a SCS to attain standards, rather than providing for immediate compliance with the emission limitations that Dow was required to meet in 1975, the revision does not satisfy the statutory requirements and cannot be approved by USEPA.

5. Health Effects From Use of Supplementary Control System as Compared to Continuous Emission Controls

Dow submitted various opinions from individuals concerning the health and welfare effects to be gained by requiring Dow to implement continuous emission controls as opposed to permitting Dow to continue to use its SCS to keep from violating the SO_2 NAAQS. DOW claims that "no significant health effects will be prevented by controlling DOW-Midland SO_2 emissions below the SCS level." Congress considered health and welfare effects in passing the Clean Air Act Amendments of 1970 and 1977. Congress determined that use of dispersion techniques may result in adverse health and welfare impacts hundreds of miles from a source and therefore required use of continuous emission reduction technology to attain the standards. See H.R. Rep. No. 95-294, 95th Cong. 1st. Sess. (1977) at 79-94. USEPA has no authority to override that congressional judgment.

The comments of American Lung Association of Michigan have been addressed in USEPA's response to Dow's comments with the exception of No. 4 which asserted that the proposed SIP revision does not provide for emission monitoring as required in Section 114(a) of

the Act and in State regulations. Section 114(a)(1) of the Act provides the Administrator with discretionary authority to require a source to perform in-stack monitoring of emissions in order to assist in the determination of whether or not compliance is being achieved.

American Lung also cites Michigan rules which require in-stack monitoring as a condition for obtaining relief from sulfur emission limits beyond 1980. The discretionary authority found in Section 114(a)(1) is not applicable to this situation inasmuch as it does not establish criteria for SIP approval or disapproval. In addition, State requirements for extending compliance dates are a matter of State law and do not establish Federal requirements for the approval or disapproval of a SIP by USEPA.

USEPA has determined the proposed SIP revision, Consent Order No. 01-1979, dated February 13, 1979, lacks a demonstration that the primary and secondary National Ambient Air Quality Standards will be attained and maintained without use of a supplementary or intermittent control system, does not provide for continuous emission reduction, and does not contain emission limitations for sulfur dioxide and particulates.

Therefore, the revision is disapproved as not complying with the requirements of Sections 110(a)(2) and (3). (42 U.S.C. 7410(a)(2) and (3)).

Under Executive Order 12044 (43 FR 12661), USEPA is required to judge whether a regulation is "significant" and, therefore, subject to certain procedural requirements of the Order or whether it may follow other specialized development procedures. USEPA labels these other regulations as "specialized." I have reviewed this

regulation and determined that it is a specialized regulation not subject to the procedural requirements of Executive Order 12044.

This Final Rulemaking is issued under the authority of Section 110 of the Clean Air Act as amended (42 U.S.C. 7410, *et. seq.*)

Dated: March 18, 1980

Douglas Costle,
Administrator.

[FR Doc. 80-8980 Filed 3-25-80; 8:45 am]

BILLING CODE 6560-01-M

NON-FULLY OWNED SUBSIDIARIES AND AFFILIATES OF THE DOW CHEMICAL COMPANY AS OF FEBRUARY 28, 1981

Subsidiaries and affiliates owned both directly and indirectly have been included. The company underlined is the direct owner of the companies listed below it. "Dow's" percent ownership is indicated by each company.

SUBSIDIARIES

The Dow Chemical Company

Gruppo Lepetit S.p.A. (92%)
L.I.F.E. (Laboratorios Industriales Farmaceuticos Ecuatorianos) (59%)
Laboratorios L.I.F.E. del Salvador S.A. (100%)
Negocios e Industrias S.A. "Neisa" (100%)
Pacific Chemical Berhad (51%)
Propenasa-Produtos Petroquimicos Nacionais S.A. (80%)
Ivon Watkins-Dow Ltd (51%)
Dow Banking Corporation (76%)

Administration de Participations Etrangeres S.A. (A.P.E. owned 100% by Gruppo)

Lepetit Pharmaghreb (65%)
Lepetit S.A. (France) (99%)
Lepetit (Thailand) Company Ltd (83%)
Lepetit Iran S.A. (93%) (No longer controlled or consolidated by The Dow Chemical Company)

Dow Chemical A.G. (A.G. owned 100% by The Dow Chemical Company)

Dow Chemical Iberica S.A. (99%)
Petroquimica-Dow S.A. (70%)

AFFILIATES

The Dow Chemical Company

Arabian Chemical Company (50%)
Cordis Dow Corporation (50%)
Dow Corning Corporation (50%)
The D-H Titanium Company (50%)
Dowell Schlumberger Corporation (50%)
Compagnie des Services Dowell Schlumberger (50%)
El Dorado Terminals Company (50%)
The Kartridge Pak Company (50%)
Korea Pacific Chemical Corporation (50%)
AgroQuim Maringa (20%)
Bank Mendes Gans (29%)
Chemi-Trol Chemical Company (23%)
DINA (49%)
DOKI (49%)
Estireno Del Zulia C.A. (25%)
Ibafon Chemical Ltd (40%)
Oasis Pipeline Company (30%)
Package Machinery Company (28%)
Piramides Brazil (22%)
Spuma Pac Cia Brasilerira (41%)
Top Drilling, Inc (33%)
Total Raffinaderij Nederland N.V. (20%)
Zoo Agro de Venezuela C.A. (49%)

Dow Chemical A.G.

Asahi-Dow Limited (50%)
Polychem Ltd (25%)

Coral Navigation (Coral is owned 100% by The Dow Chemical Company)

Chief Shipping Company (50%)

Dow Chemical Company Ltd (Ltd is 100% owned by Dow Chemical A.G.)

Cromarty Petroleum Company Ltd (50%)

Bio-Science Enterprises (Bio-Science is 100% owned by The Dow Chemical Company)

Teijin Bio-Science (50%)
Bio-Ciencia/Lavosier Analysis Clinicas (49%)

Dow Chemical of Canada Ltd (Canada is 100% owned by The Dow Chemical Company)

Lawrason's Chemical, Ltd (20%)
Wabiskaw Explorations Limited (50%)

Maligne Resources Limited (Maligne is 100% owned by Dow Chemical of Canada Ltd)

MT Partnership (50%)

4. The proposed revision should be approved because of equitable considerations.

5. Since the supplementary control system enables Dow to keep from violating NAAQS, "no significant health effects would be presented by controlling Dow-Midland sulfur dioxide emissions below the SCS level."[3]

The comments of the American Lung Association of Michigan supported disapproval of the Consent Order as a SIP revision and stressed the following points:

(1) The Order is contrary to law in that it permits reliance on a SCS for control of emissions from the Dow-Midland complex.

(2) The period during which Dow is permitted to use the SCS to control emissions does not qualify as an interim period under the Clean Air Act or case law.

(3) The Consent Order does not satisfy the SIP requirements of Section 172 of the Clean Air Act for nonattainment areas.

(4) The Consent Order does not provide for adequate emission monitoring for enforcement purposes.

(5) It would be inequitable to approve the Consent Order as a SIP revision.

As set forth below, the comments of Dow do not justify approval of the Consent Order as a SIP revision.

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[3] Health and Welfare Benefits of Continuous Control of Sulfur Dioxide emissions, prepared for Dow Chemical Co., November 17, 1978.

1. Requirements of Section 110(a)(3)(A) and Sections 302(k) and 302(m) of the Clean Air Act

A. Section 110(a)(3)(A) of the Clean Air Act provides for approval of SIP revisions by the Administrator if the revision "meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings." Paragraph (2) refers to Section 110(a)(2) which requires in subparagraph (B) that the revision contain "emission limitations * * * and such other measures as may be necessary to insure attainment of such primary or secondary standard * * * ." Section 302(k) defines "emission limitation" and "emission standard" as "a requirement * * * which limits the quantity, rate or concentration of emissions of air pollutants on a continuous basis * * * ," and Section 302(m) defines "means of emission limitation" as "a system of continuous emission reduction (including the use of specific technology or fuels with specified pollution characteristics)."

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The Act requires more than continuous compliance with the NAAQS. Section 110(a)(2)(B) requires the use of emission limitations to insure attainment and maintenance of the NAAQS. Emission limitation, as defined in Section 302(k) and 302(m) of the Act requires "continuous emission reduction." Under Section 123 of the Act the degree of emission limitation required to meet the standards cannot be affected by a dispersion technique.

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Such a system is a "dispersion technique"as described in Section 123 of the Act, i.e., "any intermittent or supplemental control of air pollutants varying with atmospheric conditions," and thus cannot be considered in determining the degree of emission limitation that Dow is required to meet. Furthermore, the Consent Order states that "Dow and the Commission agree that Federal Ambient Air Quality Standards are being met in and around Midland, Michigan, because of operation of an SCS by Dow."

Dow comments that the use of fuels may be a means of emission limitation. For the use of fuels, however, to be a proper means of compliance, the proposed SIP revision must identify the specific fuel mix to be used and include a demonstration that use of specific fuels at maximum operating conditions and "worst case" meteorology would not cause a violation of the NAAQS for either sulfur dioxide or particulates.

The proposed SIP revision that MAPCC has submitted to USEPA for approval/disapproval is deficient in that it contains no demonstration that the sulfur dioxide and particulate NAAQS would be protected without the use of Dow's SCS, a "dispersion technique."

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[6] See Dow's comments (July 20, 1979, p. 6) "This mixture of fuel varies as the concentration of the pollutant varies so that at no time is the limitation [SO_2 NAAQS] violated."

B. Dow comments that the proposed revision contains a proper emission limitation because Dow cannot exceed the SO_2 NAAQS. Dow claims this limitation [NAAQS] is a "concentration" of pollutant which Dow is required to achieve and thus is an "emission limitation" which meets the requirements of Sections 110(a)(2) and 302(k) of the Act. It is USEPA's position that the Clean Air Act not only requires compliance with the national ambient air quality standards, which are ground level concentrations, but also with emission limitations, which limit the amount of pollutants emitted by a source (42 U.S.C. 7410(a)(2) (A) and (B). Emission limitations, as applied to a source, must "assure continuous emission reduction" 42 U.S.C. 7602(k) and (m). Dow is required to comply with both ground level concentrations (ambient standards) and emission limitations designed to attain the ambient standards. Compliance by Dow with ground level concentrations of the SO_2 NAAQS does not constitute compliance with its emission limitation in the federally approved SIP. The Order which requires only compliance with the ground level concentrations of the SO_2 NAAQS does not meet the statutory requirements of Section 110(a)(2)(B) (42 U.S.C. 7410(a)(2)(B)).

The proposed revision is also deficient in that it does not contain any emission limitations for particulates or visual emissions.

2. *Interim Use of Supplementary Control Systems*

Dow comments on page 3 of its July 20, 1979 counsel's letter to USEPA that "Regardless, therefore, of whether the System is continuous means of emission control, EPA should permit the use of it in the interim"; and that nothing in the Clean Air Act nor case law prohibits the use of SCS on an interim basis. In support of its position

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The comments of American Lung Association of Michigan have been addressed in USEPA's response to Dow's comments with the exception of No. 4 which asserted that the proposed SIP revision does not provide for emission monitoring as required in Section 114(a) of

the Act and in State regulations. Section 114(a)(1) of the Act provides the Administrator with discretionary authority to require a source to perform in-stack monitoring of emissions in order to assist in the determination of whether or not compliance is being achieved.

American Lung also cites Michigan rules which require in-stack monitoring as a condition for obtaining relief from sulfur emission limits beyond 1980. The discretionary authority found in Section 114(a)(1) is not applicable to this situation inasmuch as it does not establish criteria for SIP approval or disapproval. In addition, State requirements for extending compliance dates are a matter of State law and do not establish Federal requirements for the approval or disapproval of a SIP by USEPA.

USEPA has determined the proposed SIP revision, Consent Order No. 01-1979, dated February 13, 1979, lacks a demonstration that the primary and secondary National Ambient Air Quality Standards will be attained and maintained without use of a supplementary or intermittent control system, does not provide for continuous emission reduction, and does not contain emission limitations for sulfur dioxide and particulates.

Therefore, the revision is disapproved as not complying with the requirements of Sections 110(a)(2) and (3). (42 U.S.C. 7410(a)(2) and (3)).

Under Executive Order 12044 (43 FR 12661), USEPA is required to judge whether a regulation is "significant" and, therefore, subject to certain procedural requirements of the Order or whether it may follow other specialized development procedures. USEPA labels these other regulations as "specialized." I have reviewed this

regulation and determined that it is a specialized regulation not subject to the procedural requirements of Executive Order 12044.

This Final Rulemaking is issued under the authority of Section 110 of the Clean Air Act as amended (42 U.S.C. 7410, *et. seq.*)

Dated: March 18, 1980

Douglas Costle,
Administrator.

[FR Doc. 80-8980 Filed 3-25-80; 8:45 am]

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Office-Supreme Court, U.S.
FILED
APR 20 1981
ALEXANDER L. STEVAS,
CLERK

80-1708

NO. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

THE DOW CHEMICAL COMPANY,
a Delaware corporation,
Petitioner,
vs.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
and DOUGLAS M. COSTLE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT (Supplemental Appendix Listing Non-Fully Owned Subsidiaries and Affiliates)

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NON-FULLY OWNED SUBSIDIARIES AND AFFILIATES OF THE DOW CHEMICAL COMPANY AS OF FEBRUARY 28, 1981

Subsidiaries and affiliates owned both directly and indirectly have been included. The company underlined is the direct owner of the companies listed below it. "Dow's" percent ownership is indicated by each company.

SUBSIDIARIES

The Dow Chemical Company

Gruppo Lepetit S.p.A. (92%)
L.I.F.E. (Laboratorios Industriales Farmaceuticos Ecuatorianos) (59%)
Laboratorios L.I.F.E. del Salvador S.A. (100%)
Negocios e Industrias S.A. "Neisa" (100%)
Pacific Chemical Berhad (51%)
Propenasa-Produtos Petroquimicos Nacionais S.A. (80%)
Ivon Watkins-Dow Ltd (51%)
Dow Banking Corporation (76%)

Administration de Participations Etrangeres S.A. (A.P.E. owned 100% by Gruppo)

Lepetit Pharmaghreb (65%)
Lepetit S.A. (France) (99%)
Lepetit (Thailand) Company Ltd (83%)
Lepetit Iran S.A. (93%) (No longer controlled or consolidated by The Dow Chemical Company)

Dow Chemical A.G. (A.G. owned 100% by The Dow Chemical Company)

Dow Chemical Iberica S.A. (99%)
Petroquimica-Dow S.A. (70%)

AFFILIATES

The Dow Chemical Company

Arabian Chemical Company (50%)
Cordis Dow Corporation (50%)
Dow Corning Corporation (50%)
The D-H Titanium Company (50%)
Dowell Schlumberger Corporation (50%)
Compagnie des Services Dowell Schlumberger (50%)
El Dorado Terminals Company (50%)
The Kartridge Pak Company (50%)
Korea Pacific Chemical Corporation (50%)
AgroQuim Maringa (20%)
Bank Mendes Gans (29%)
Chemi-Trol Chemical Company (23%)
DINA (49%)
DOKI (49%)
Estireno Del Zulia C.A. (25%)
Ibafon Chemical Ltd (40%)
Oasis Pipeline Company (30%)
Package Machinery Company (28%)
Piramides Brazil (22%)
Spuma Pac Cia Brasilerira (41%)
Top Drilling, Inc (33%)
Total Raffinaderij Nederland N.V. (20%)
Zoo Agro de Venezuela C.A. (49%)

Dow Chemical A.G.

Asahi-Dow Limited (50%)
Polychem Ltd (25%)

Coral Navigation (Coral is owned 100% by The Dow Chemical Company)

Chief Shipping Company (50%)

Dow Chemical Company Ltd (Ltd is 100% owned by Dow Chemical A.G.)

Cromarty Petroleum Company Ltd (50%)

Bio-Science Enterprises (Bio-Science is 100% owned by The Dow Chemical Company)

Teijin Bio-Science (50%)
Bio-Ciencia/Lavosier Analysis Clinicas (49%)

Dow Chemical of Canada Ltd (Canada is 100% owned by The Dow Chemical Company)

Lawrason's Chemical, Ltd (20%)
Wabiskaw Explorations Limited (50%)

Maligne Resources Limited (Maligne is 100% owned by Dow Chemical of Canada Ltd)

MT Partnership (50%)

No. 80-1708

MAY 20 1981

ALEXANDER L. STEVAS

In the Supreme Court of the United States

OCTOBER TERM, 1980

DOW CHEMICAL COMPANY, PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND ANNE M. GORSUCH, ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Clean Air Act as amended in 1977 requires that national ambient air quality standards be met in each air quality region by systems of continuous emission controls rather than by systems dependent on dispersion techniques such as intermittent emission controls, except in circumstances defined in two provisions of the Act on which petitioner correctly does not rely in this case.

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In the Supreme Court of the United States

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is not yet reported. The decision and order of the Administrator of the Environmental Protection Agency (Pet. App. 26-33) are reported at 45 Fed. Reg. 19566 (1980).

JURISDICTION

The judgment of the court of appeals (Pet. App. 35) was entered on December 9, 1980. A petition for rehearing was denied on February 9, 1980 (Pet. App. 36). The petition for a writ of certiorari was filed effective April 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On May 31, 1972, the Administrator of the Environmental Protection Agency ("EPA"), acting pursuant to Section 110 of the Clean Air Act, 42 U.S.C. (1970 ed.) 1857c-5,[1] approved the Michigan State Implementation Plan for meeting national ambient air quality standards. That plan, *inter alia*, established sulfur dioxide and particulate matter emission limitations for power plants owned and operated by petitioner Dow Chemical Company as part of its industrial facilities in Midland, Michigan. 37 Fed. Reg. 10873 (1972); 40 C.F.R. 52.1170 *et seq.* The implementation plan also established compliance schedules requiring Dow to meet its sulfur dioxide emissions limitation by July 1, 1975, and its particulate matter emissions limitations by April 1, 1975. 40 C.F.R. 52.1175(d)(2)(ii) and (e).

Dow planned to comply with these requirements by shutting down its power plants and purchasing process steam from a nuclear plant then under construction and scheduled for completion in 1974. By 1974, however, Dow became aware that the nuclear plant would not be completed until several years after the 1975 attainment dates (Pet. 3; Pet. App. 27).[2] To meet the 1975 deadline, Dow chose instead to

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[1]The Clean Air Act was substantially amended and transferred to 42 U.S.C. (Supp. III) 7401 *et seq.*, by the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, 42 U.S.C. (Supp. III) 7401 *et seq.* Subsequent citations are to the Act as amended in 1977, except where otherwise noted.

[2]"Pet. App. 27" refers to a particular section of EPA's formal ruling disapproving the proposed revision of the implementation plan concerned in this case. That ruling and another EPA ruling are reproduced in both the main appendix to the petition and in a supplemental appendix ("Supplemental Appendix B") filed by Dow; but the latter, although more readable, is not paginated. We shall refer only to the paginated appendix, but we note that any reference to a section within pages 14 to 33 of "Pet. App." indicates text that may also be found in the supplemental appendix.

use an intermittent control system. Dow purchased and installed in its coal-fired boilers equipment that enables it to shift from coal to oil or natural gas when it determines that atmospheric conditions are poor and pollution levels might exceed national ambient air quality standards. When atmospheric conditions permit, Dow continues to burn coal (Pet. App. 27). National ambient air quality standards (hereinafter "national standards") are met when ground level concentrations of a particular pollutant, as measured by monitoring devices in the immediate area, do not exceed specified limits (*id.* at 30). Dow's means of complying with national standards is known as a " 'dispersion technique' " because it permits the emission of pollutants in volumes that might exceed the standards if it were not for the fact that atmospheric conditions disperse some portion of the pollutants to other regions before they can concentrate and be measured at ground level near the source (*id.* at 5, 30, 32; see also *id.* at 10-13).

On May 17, 1974, Dow and the Michigan Air Pollution Control Commission ("MAPCC") entered into consent order No. 12-73-05, purporting to authorize Dow to postpone final compliance with its sulfur dioxide emission limitation until July 1, 1980, the revised projected date for completion of the nuclear plant. In the interim, the order authorized Dow to use its intermittent control system (Pet. App. 27, 46-50).[3]

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[3]MAPCC forwarded a copy of this order to EPA as "a 'compliance schedule' "; but it did not ask EPA to consider the order as a revision of the state implementation plan. *Dow Chemical Co.* v. *Costle*, 480 F. Supp. 315, 317 (E.D. Mich. 1978), appeal pending, No. 79-1491 (6th Cir., docketed Sept. 4, 1979). Accordingly EPA took no action on the order. In *Dow Chemical Co.* v. *Costle, supra*, Dow sought to compel EPA to approve the consent order as an implementation plan revision; the district court granted EPA's motion to dismiss for lack of subject matter jurisdiction.

By July 1977, it had become apparent that completion of the nuclear plant would extend beyond 1980. Dow and MAPCC executed a new consent order that did not extend Dow's compliance date, but provided that Dow would begin burning oil or natural gas continuously as of July 1, 1980. Use of the intermittent control system was again permitted until that date (Pet. App. 27, 53-60). At an MAPCC meeting attended by a Dow representative, an EPA spokesman stated that operation of an intermittent control system *in lieu* of constant emission controls was unacceptable (*id.* at 84, 86, 104).

Further delays pushed back the nuclear plant's projected completion date from 1980 until the end of 1982 (Pet. 3). MAPCC and Dow therefore entered into further negotiations, which culminated in a new consent order, APC No. 01-1979. This order (1) removed the requirement that Dow commence continuous burning of compliance fuels by July 1, 1980, and (2) authorized the continued use of an intermittent control system until December 31, 1982, at which time Dow would either purchase steam from the nuclear plant (if completed)[4] or use cleaner fuel on a continuous basis (Pet. App. 27, 70-77).

On February 14, 1979, this new consent order was formally submitted to EPA as a proposed revision of the state implementation plan pursuant to 42 U.S.C. (Supp. III) 7410(a)(3). On March 26, 1980, after publishing in the Federal Register a proposal to disapprove the revision and soliciting comments thereon, EPA took final action disapproving the proposed implementation plan revision (45 Fed. Reg. 19566 (1980); Pet. App. 26-33). In taking this action, EPA noted, *inter alia*, (1) that the Clean Air Act as amended in 1977 requires that national standards be met

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[4]In fact, Dow now states that the nuclear plant will not be operational until 1984 (Pet. 3 n.1).

through continuous emission reductions alone, *i.e.*, without consideration of the effects of dispersion techniques, (2) that the consent order does not provide for continuous emission reductions, and (3) that EPA was therefore required to disapprove it pursuant to 42 U.S.C. (Supp. III) 7401(a)(3).

Dow filed a petition to review that action in the court of appeals. That petition was consolidated with two other petitions filed by Dow seeking review of EPA's designation of Midland County as a "nonattainment" area for sulfur dioxides pursuant to 42 U.S.C. (Supp. III) 7407(d), *i.e.*, an area in which national standards have not been attained. The cases were consolidated because the court of appeals concluded that all three petitions presented the question whether Congress, in the Clean Air Act Amendments of 1977, precluded EPA from considering the effects of any intermittent pollution control system, used on an interim basis, in EPA's determination whether national standards are being met in a particular area (Pet. App. 2, 3-4).

The court of appeals denied the petitions for review, concluding (Pet. App. 4-5) that the plain language of the statute refuted Dow's contention that a valid state implementation plan could permit Dow to continue using its intermittent control system on an "interim" basis where the consent orders with the MAPCC established that it is economically infeasible for Dow to employ a continuous control system before the nuclear plant is in operation. The court considered the legislative history proffered by Dow in support of its construction of the statute, but concluded (Pet. App. 6; emphasis added) that although "*some* of the language [in the legislative history] relied upon by Dow" appeared to conflict with the statute's "unambiguous language," the legislative history does not warrant construing the statute in a manner contrary to its plain meaning.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with decisions of this Court of any other court of appeals. For these reasons, and because Dow's contention with respect to the permissibility of its "interim" use of an intermittent control system concerns an interim use extending through nearly a decade, with no assured end in sight, review by this Court is unwarranted.

1. The plain language of the Clean Air Act as amended in 1977 refutes Dow's contention that the Administrator of EPA is required to approve a revision of a state implementation plan that permits Dow to continue relying, on an "interim" basis, on its system of intermittent controls of sulfur dioxides. The Clean Air Act requires the Administrator to approve a state implementation plan if, *inter alia,* it includes "emission limitations" (42 U.S.C. (Supp. III) 7410(a)(2)(B)); and he must approve revisions to a state implementation plan if it meets all the requirements applicable to the original plan (42 U.S.C. (Supp. III) 7410 (a)(3)). In 1977, Congress defined "emission limitation" as a requirement limiting "the quantity, rate, or concentration of emissions of air pollutants *on a continuous basis,* including any requirement relating to the operation or maintenance of a source to assure *continuous emission reduction.*" 42 U.S.C. (Supp. III) 7602(k) (emphasis added). Congress similarly defined "means of emission limitation" as "a system of continuous emission reduction * * *." 42 U.S.C. (Supp. III) 7602(m). In another section added in 1977 (42 U.S.C. (Supp. III) 7423(a)), Congress declared, without exception, that "dispersion technique[s]" not in use before 1970 could not be used to affect "in any manner" the "degree of emission limitation required for control of any air pollutant under an applicable implementation plan"—*i.e.* national standards must be met with systems that do not

depend on such techniques. It defined " 'dispersion techniques' "as including "any intermittent or supplemental control of air pollutants varying with atmospheric conditions." 42 U.S.C. (Supp. III) 7423(b).

Congress was aware, however, of certain circumstances in which reliance on dispersion techniques as a means of meeting the national standards might be necessary. It thus provided two exceptions to the general prohibition against such reliance. In 42 U.S.C. (Supp. III) 7419(d)(2), the Act allows the Administrator to grant temporary waivers of constant emission reduction requirements for primary nonferrous smelters in certain cases. In 42 U.S.C. (Supp. III) 7413(d), it allows the Administrator to grant a delayed compliance order to any stationary source that demonstrates, *inter alia*, that it is unable to comply with the applicable implementation plan's requirements. Such orders, however, may permit deferral of compliance only until July 1, 1979, or until three years after the original date for final compliance, whichever is later. 42 U.S.C. (Supp. III) 7413(d)(1)(E).

The court of appeals correctly read the language of the 1977 Act as clearly inconsistent with Dow's "interim basis" argument. Dow does not purport either to operate nonferrous smelters or to have applied for a delayed compliance order, and even had it successfully applied for such an order, it would not have been entitled to the lengthy delay it is seeking. Thus, the general prohibition against meeting national standards through intermittent controls is fully applicable.

2. Contrary to Dow's contention (Pet. 8-13), the court of appeals did not ignore the legislative history of the 1977 Amendments. It "read and considered the language relied on by Dow" (Pet. App. 6) and still found Dow's proposed construction of the Act unpersuasive. The court agreed

(*ibid.*) that "some of the language" relied on by Dow seemed to conflict with the plain language of the statute, but it appended to its decision the portions of the relevant legislative report it evidently found more indicative of congressional intent (Pet. App. 7-13). It is clear, therefore, that the court's reference to authorities standing for the proposition that "courts do not turn to legislative history to shed light on the meaning of easily understandable and unambiguous statutory enactments" (*id.* at 6), does not, in context, conflict with *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976), respecting the use of legislative history in construing a statute.

The court of appeals' refusal to read the legislative history as overcoming the plain language of the statute was correct. In a series of cases litigated in the early to mid-1970's (see Pet. 6), various parties had contended that the Administrator of EPA should approve state implementation plans under the Clean Air Act that permitted pollution sources to rely on techniques, such as tall stacks or intermittent releases of emissions, that prevented concentrations of pollutants in violation of national standards in a given region by dispersing them into other areas, rather than relying on continuous control systems that limited the total amounts of pollutants emitted. Congress, concerned that use of dispersion techniques would undermine the goals of the Clean Air Act, since such control systems allowed a state to meet standards by shifting its pollution elsewhere (see H.R. Rep. 95-294, 95th Cong., 1st Sess. 81-86 (1977) (hereinafter "H. Rep.")), amended the Act in 1977, as explained above, to make the federal policy concerning dispersion techniques completely clear. The House Report generally condemns use of dispersion techniques, particularly where sulfur dioxides and other sulfates are concerned, primarily because atmospheric loading of such pollutants can adversely affect the health of human beings and plant and animal life

hundreds of miles downwind from the source, even though national ambient air quality standards are met in the region in which the source is located. H. Rep. 95-294 at 84-87, 128-133. To be sure, the report was primarily critical of industry contentions that intermittent control systems were permissible means of meeting national standards without regard to whether the controls were permanent or temporary (H. Rep. 95-294 at 81), but suggestions in the legislative history that such control systems might be acceptable on a temporary basis in certain circumstances are entirely consistent with the plain language of the statute, which, as noted above, provides for such temporary use in the provisions concerning nonferrous smelters and delayed compliance orders.

The report's agreement (H. Rep. 95-294 at 91-92) with the "general thrust" of three court of appeals decisions (*Natural Resources Defense Council, Inc.* v. *EPA*, 489 F. 2d 390 (5th Cir. 1974), rev'd in part *sub nom. Train* v. *Natural Resources Defense Council Inc.*, 421 U.S. 60 (1975); *Big Rivers Electric Corp.* v. *EPA*, 523 F. 2d 16 (6th Cir. 1975), cert. denied, 425 U.S. 934 (1976); *Kennecott Copper Corp.* v. *Train*, 526 F. 2d 1149 (9th Cir. 1975), cert. denied, 425 U.S. 935 (1976)) similarly does not compel acceptance of Dow's reading of the statute. The *thrust* of the decisions is simply that pollution was to be controlled, if at all possible, by emission reduction rather than by dispersion techniques. While *Kennecott Copper* specifically approved interim use of intermittent controls (526 F. 2d at 1156, 1158-1160), that case concerned nonferrous smelters.

Finally, inasmuch as the court below was upholding EPA's construction of the statute, it had an additional basis for its holding. "It is by now a commonplace that 'when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.' "

EPA v. *National Crushed Stone Ass'n*, No. 79-770 (Dec. 2, 1980), slip op. 18, quoting *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (footnote omitted).

3. Dow's contention (Pet. 13-18) that the court of appeals' decision conflicts with this Court's construction of the Clean Air Act in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975), and *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976), is without merit. In *Train* the Court merely held that, under the statute as it then existed, the states were free to make their own "choices of *emission limitations*" so long as national standards are met (421 U.S. at 79; emphasis added), *i.e.* a state was free to choose the mix of emission limitations imposed on sources in the state. This point was reiterated in *Union Electric* (427 U.S. at 266), another case concerned with the statute prior to the 1977 amendments. The Court added (*id.* at 267; emphasis added) that each state "has virtually absolute power in allocating *emission limitations* so long as the national standards are met," and it held that because the Clean Air Act is a technology-forcing statute, a state could insist on more stringent emission requirements, even if the Administrator deemed them economically and technologically infeasible.

In our view, requirements that permit national standards to be met through the use of dispersion devices such as intermittent controls did not constitute "emission limitations" even before the 1977 amendments, since they did not continuously limit the amount of pollutants released into the atmosphere. In any event, the statutory language now leaves no doubt that control strategies like the one used by Dow do not qualify as emission limitations (see page 6, *supra*), and the Administrator thus properly has refused to

approve the proposed state implementation plan revision that would permit them, even on an interim basis, where they do not come within the limited exceptions provided in the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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